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REPORTS

Jul. 26

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

CITY OF NEW YORK.



BY

JOHN DUER, LL.D.

ONE OF THE JUSTICES OF THE COURT.

VOLUME II.

ALBANY:

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MDCCCLV.

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Rec. March 14, 1855

JUSTICES
OF THE
NEW YORK SUPERIOR COURT,
DURING THE TIME OF THESE REPORTS.

THOMAS J. OAKLEY, Ch. J.,	
JOHN DUER,	
WILLIAM W. CAMPBELL,	
ELIJAH PAINE,*	
JOSEPH S. BOSWORTH,	
ROBERT EMMET,	
MURRAY HOFFMAN.†	

} JUSTICES.

* Mr. Justice PAINE died on the 15th October, 1853. The vacancy was supplied on the following November.

† Elected by the people, and appointed by the Governor to supply the vacancy created by the death of Judge PAINE, and took his seat on the Bench on the third Monday of November term, 1853.

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C A S E S

ARGUED AND DETERMINED

IN

THE SUPERIOR COURT

OF THE

CITY OF NEW YORK.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellants, *against* WILLIAM COLGATE, Respondent.

Assessments, imposed in proceedings, taken under the "Act to reduce several laws relating particularly to the City of New York into *one act*," passed April 9, 1813, and the acts amending the same, to widen and straighten streets in the City of New York, upon the owner of a lot, on account of the benefit to accrue to such lot, are an actual and first lien upon the lot, and payment of the sum assessed may be enforced in the same manner, as if the lot had been actually mortgaged for the payment thereof.

A sale of the lot at auction by the Corporation to collect the sum assessed, when the proceedings become ineffectual to vest any title in the purchaser, through the mere misjudgment of the officers of the Corporation, is not a bar to an action to recover the assessment, if the owner has not been damnified by the sale, nor disturbed in his possession of the premises.

Such a demand is not barred by the statute of limitations within a shorter period, than a demand arising from an actual mortgage of real estate.

(Before CAMPBELL, BOSWORTH, and EMMET, J. J.)

December 7, 8, 1852; February 26, 1853.

THIS action was brought to enforce payment of the sum of \$265, the amount of an assessment imposed on certain lands of the defendant in the City of New York, for the benefit accruing to such lands, in consequence of the widening and straightening of *John street*, in said city, together with interest on that sum from April 3, 1839, the date of the confirmation of the report of such assessment. The action was tried by the Court without

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a jury, and judgment was given for the defendants. From that judgment the plaintiffs have appealed. The facts of the case are briefly these :

Before the 12th of November, 1838, three commissioners of estimate and assessment were duly appointed, qualified and acting as commissioners of estimate and assessment in a certain proceeding then pending in the Supreme Court of New York, relative to the widening and opening of *John street*, in the City of New York.

On the 12th of November, 1838, the commissioners reported their proceedings to the Supreme Court, and among other things, reported that they had assessed *William Colgate* \$265, by reason of the benefit to accrue to certain premises particularly described in the report, and also in the complaint in this action. That report was confirmed on the 3rd of April, 1839.

At the time the report was made, and at the time this action was tried, the defendant owned such premises.

On the 24th of October, 1841, the assessment not having been paid, the premises were sold by the plaintiffs at public auction to one *Robert Colgate*, as purchaser, for a sum sufficient to satisfy the assessment, the interest thereon, and the costs and expenses of the sale. A certificate, signed by the *Street Commissioner*, was given to such purchaser, stating the fact of his purchase, the amount paid, and that he would be entitled to a lease for ten years, after the expiration of two years from the date of the certificate, unless the premises should be redeemed from the sale within that time.

The following conditions of the sale, were declared and published at the sale :—

“CONDITIONS OF SALE.—The property will be sold for the lowest term of years that any person will offer to take the same, in consideration of advancing the amount of the assessment, interest and charges thereon. Certificates will be given as soon as they can be made out to the purchasers; and at the end of two years, a lease will be given for the term the property was sold for, unless it should be redeemed within that time; in which case, the purchasers will have their money returned, with interest at the rate of fourteen per cent. per annum.

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"Should any mistake or irregularities in the proceedings for assessments, collections or sales on the part of the corporation be discovered, so as to prevent this sale from being effectual, the sale to be void; and the purchase money with interest for the time, will be returned. The whole of the purchase money to be paid immediately after the sale.

"JOHN EWEN,

"*Street Commissioner.*"

"Street Commissioner's Office,

"October 27th, 1841."

The redemption notice, in reference to such sale, given by the Street Commissioner, was published for the same length of time, and in the same manner as that mentioned, and referred to in *Dougherty & Hope*, 3 Denio, p. 594, and 1 Coms. p. 79. It was therefore ineffectual to vest a title in *Robert Colgate* for the term of ten years, mentioned in the certificate of his purchase.

In February, 1848, the Mayor, Aldermen, and Commonalty of the City of New York, passed an ordinance for the return to the purchaser, in this and similar cases, of the purchase money.

On the 2nd of May, 1849, *Robert Colgate* presented to the Street Commissioner the certificate of the purchase, and demanded a return of the purchase money.

It was returned to him with interest, and the certificate of purchase was then surrendered by him, as cancelled, to the Street Commissioner.

The assessment remaining unpaid, and the defendant refusing to pay it, this action was commenced in June, 1851, to recover it with interest, and to obtain a judgment of the Court, that it was a lien upon the premises in question, and that the premises be sold to satisfy the same together with the costs of this action.

The cause was tried at special term before Mr. Justice SANDFORD, who rendered judgment *pro forma* for the defendant with leave to the plaintiffs to appeal without security to the general term.

H. E. DAVIES, for the plaintiffs, now contended that the judgment for the defendants should be reversed and a judg-

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ment be entered for the plaintiffs upon the following grounds :

I. The assessment was regular, and constituted a valid lien upon the lands described in the report. § 178, of act of April 9th, 1813. 1. The lands deemed to be benefited, are correctly described, and the amounts of the benefits ascertained. 2. This report has become a judgment of the Supreme Court by its confirmation, and is binding and conclusive on all. (*Embury vs. Conner*, 3 Comstock, 522.) 3. If there was any irregularity, it was to be taken advantage of and objected to on the motion to confirm the report. (Same case. *Stafford vs. The Mayor of Albany*, 6 John. Rep. p. 4.) The court say an assessment cannot be set aside for irregularity. "The statute makes the assessment conclusive; and the rights of the parties were fixed when the suit was commenced," it being a suit to recover an award for damages which had been confirmed and subsequently set aside for irregularity.—Held that the plaintiff could recover. Chan. Kent (in *Le Roy vs. the Mayor, &c.* 4 John Ch. Rep. 354), on the authority of English cases then cited, held an assessment for sewer final; on the ground, that the act declared the ratification to be final and conclusive.

II. The sale of November 24th, 1841, did not extinguish or impair the lien. 1. It was a condition of the sale, that if any irregularity should be discovered, so as to render it ineffectual, the sale was to be void, and the purchase money returned. 2. It is conceded, that the redemption notice not having been published according to the statute, no lease could ever be given to the purchaser on said sale; or, if given, would not have conveyed any title. (*Striker v. Kelly*, 7 Hill. Rep. *Doughty v. Hope*, 3 Denio, 598.) 3. The conditions of the sale rendered it void; and the purchaser could recover from the corporation the amount paid on the sale. (1 Sand. Sup. Ct. Rep. 485.) 4. A defendant, arrested on a *Ca. Sa.* set aside for irregularity, may be arrested again on another *Ca. Sa.* issued upon the same judgment. (*Merchant v. Franks*, 3 Ad. & E.) A foreclosure and sale on a mortgage does not extinguish the debt, only *pro tanto*. (*Globe Ins. Co. v. Lansing*, 5 Cowen, 380. *Lansing v. Goelet*, 9 *ibid.* 346.)

Lands sold on execution for less than the amount due, may

be re-sold if they become the property of the debtor, the lien of the judgment still continuing. Bronson, J., says, "But when Brackett, the judgment debtor, redeemed from that sale, Davis (the purchaser at the former sale) got his money back again with interest, and the sale became null and void." (*Wood v. Colvin*, 5 Hill.) A sale by sheriff does not divest the estate of the debtor, unless the purchase money is paid, and the deed delivered. (*Catlin v. Jackson*, 8 John. Rep. 406.) On page 429, Chancellor Kent says: "If the money is not paid, or if the sale does not operate to satisfy the debt, what benefit arises to the owner? It would be competent for the sheriff to return, that the money was not paid, and that the premises remained unsold. In chancery, if the money bid at auction is not paid, it is the uniform practice to annul the sale." A sale by one of the commissioners of loans, under a mortgage given to the commissioners, the statute requiring that two commissioners should be present at the sale, and a deed delivered, it was held that the sale was void; but not pretended that the mortgage was paid, or the lien created by it affected or impaired. (*Powell v. Tuttle*, 4 Comstock.)

III. The confirmation by the court of the assessment for benefit, created a lien in favor of the corporation, having priority of all other liens: 1. By way of mortgage; 2. By way of judgment. 1. Section 223 declares, that all assessments thereafter to be made by virtue of that act, shall become liens, &c., and shall be entitled to a preference over all other incumbrances upon the same; and may be sued for and recovered, in like manner as if the said houses, &c., were mortgaged to the corporation for the payment thereof. In *Dale v. McEvers*, 2 Cowen, 118, it was held, that a tax laid upon real estate in the city of New York, for the purpose of opening or improving a street, &c., takes preference to a prior mortgage. It is apparent from the course of legislation in this state, that the legislature have ever treated these statute liens precisely as a mortgage. And in accordance with § 223, of the act of 1813, as prior mortgages. This is manifest from a perusal of § 162 and § 163, of the act of April 9th, 1813. Those sections provide, that in all cases where any assessment, tax, rate, charge, &c., in favor of or payable to the Mayor, &c., shall, by virtue of any act or

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acts of the legislature of this state, be made, or in any manner become a mortgage, lien, charge or incumbrance, upon any lands, it shall be the duty of the Mayor, &c., to cause a note thereof to be filed with the register, &c. And no such assessment, rate, tax, charge, &c., shall in any case or manner be, or operate as a mortgage, lien, charge or incumbrance, upon any lands, &c., so as to defeat, prejudice, &c., the title or interest of any bonâ fide purchaser or mortgagee of said premises, unless said note, &c., shall have been filed with the register, &c. § 163 provides for cancelling such registry, on payment of any such assessment, rate, tax, &c. By an act of April 11th, 1815, these sections were repealed. (Laws of the city, p. 776.) It is stated in the preamble to this repealing act, that the Mayor, &c., had represented that the registering in the office of the register, of the taxes and assessments, was not only expensive, but altogether unnecessary, &c. Therefore, &c. The acts of May 14th, 1840, and May 6th, 1841, authorizing mortgagees to redeem lands sold for assessments and taxes, recognize their existence as liens; and section 3 of the former, and section 6 of the latter, create liens in their favor to the amount which they may pay on such redemption, in the same manner as though the lots were mortgaged to them. Other liens on real estate have been created by statute. 1 Rev. Stat. 3d ed. p. 396, § 37, provides, that the bond of the town collector of taxes, shall be a lien on all the real estate held jointly and severally by the collector and his sureties within the county. The act creating the office of the receiver of taxes, Laws of 1843, p. 314, § 4, enacts, that the receiver shall give bond, with sureties, and every such bond shall be a lien on all real estate held jointly and severally by the receiver and his sureties within the county, at the time of the filing thereof, and shall continue such lien till the condition thereof, and all costs and charges incurred in the prosecution thereof, shall be fully satisfied and discharged. Provision is made by law, for the chamberlain to execute a satisfaction of the bond, and thus discharge the lien. A like lien is created by the law organizing the Croton aqueduct department. Laws of 1849, p. 541, § 18, provides, that the regular water rents, when established, shall become a charge and lien upon such houses and lots, &c.; and

the same are to be collected in a similar manner with the taxes, and as a part thereof. A lien on land continues a charge thereon for the term of twenty years. (*Gore v. Brazier*, 5 Mass. Rep. 542.) 2. By the confirmation of the report by the Supreme Court, the judgment became a judicial proceeding, and a judgment *in rem* against the lands described in the report, for the amount which the court determined they were benefited. Liens by judgment are not presumed to be paid, until after the expiration of twenty years; and then that presumption may be rebutted, as in case of mortgages. Judgments are liens on lands. (2 R. S. 3d ed. p. 454, § 6; p. 455, § 7.) Such lien shall continue for ten years, after which, it ceases to be a lien, as to purchasers in good faith and subsequent incumbrances. The presumption at common law, of payment after lapse of twenty years, did not attach to a judgment. It did to a debt due by specialty and to sealed instruments. (*Smith's Ex'rs v. Miller*, 14 Wend. 188. 2 R. S. 3d ed. p. 398, § 46, 47, 48.) In *Clark v. Lector's Ex'rs*, 23d Wend. Rep. 477, plaintiffs sued out a *sci. fa.* to revive a judgment recovered previous to Jan. 1850. The case was decided in May, 1840. Nelson, Ch. J., in delivering the opinion of the court, says, "In this case, the plaintiff still has his lien against the realty, and may enforce it against the heir and terre tenant; or if that is sold under the surrogate's order, the judgment takes preference according to the lien. And probably, under § 42, the next of kin or legatees, may still be liable, if assets have been paid to them.

IV. The statute of limitations does not apply. 1. Because the lien is in the nature of a mortgage. 2. It is in the nature of a judgment *in rem*, against the land. 3. It is clearly a lien or charge on lands, which continues for twenty years. But if the claim be but a simple contract debt, the lien on the land is not discharged, though the debt be barred. (Angell on Limitations, p. 77.) If a pawnee is barred by the statute from recovering a simple contract debt, in such a case it is equally clear, although the remedy to enforce the debt may be barred, yet the lien on the property pledged will remain. Thus, in an action of trover, brought in 1800, to recover certain merchandize, the defendant, a wharfinger, claimed a lien upon it for the balance of a general account, which was due in 1790. It was

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contended, that as the balance under which the defendant insisted he was entitled to the lien had accrued in 1790, it was consequently barred. But Lord Eldon considered that the debt had not been discharged, though the remedy to enforce it had been taken away. Though the statute, he said, had run against the demand, if the creditor have possession of the goods on which he has a lien for general balance, he may hold them for that demand by virtue of the lien. (*Spears vs. Hartly*, 3 Esq. Rep. 81.) When an attorney has a lien upon a judgment, and his debt was barred by the statute, it was contended that his debt was gone; but the court held that the statute barred the remedy, but not the right; and that the attorney who had taken no steps to recover his costs for six years, had still a right to be paid from the sale of the goods. (*Higgins vs. Scott*, 2 Barn. & Adol. 413.) An acceptor may retain funds to indemnify him against his acceptances, though outstanding longer than the time limited by the statute. (*Kerrian vs. Williams*, 3 Campb. R. 418. Ld. Ellenborough.) Whether the security for a simple contract debt is a lien on property personal or real, the lien is not impaired in consequence of the debt being barred. Therefore, when a debt is due from A. to B. by a promissory note, secured by a mortgage on real estate, though the note is barred by lapse of time, yet A. is not barred of his right as mortgagee. (*Belknap vs. Gleason*, 11 Com. R. 160. *Thayer vs. Munn*, 19 Pick. 535. *Toplis vs. Baker*, 2 Cox. E. R. 123.) Intimation of Justice Sutherland, in *Jackson vs. Sackett*, 7 Wend. 94, overruled by Chan. Walworth, in *Hyer vs. Pruyn*, 7 Paige, 470; who says, it is counter to the authorities, and it could not certainly be law. But specialties are not barred by the statute. Actions founded upon contracts in fact are barred; but actions of debt created by construction of law, are not.

D. Lord, for the defendant, claimed to retain the judgment, and made and argued the following points.

I. The evidence offered by the plaintiff, to wit, the conditions of sale, the publication of the redemption notice, and the ordinance, are inadmissible, and should be ruled out by the

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Court. 1. The conditions of sale, were for the benefit of the purchaser, as between him and the Corporation, in case the sale had been illegal. The owner was no party to those conditions, and therefore cannot be prejudiced by them. 2. The sale, and all previous proceedings, were regular, and so admitted by the plaintiffs. 3. The sale being regular—any subsequent act of the plaintiffs, required to be done, is no part of the sale, nor is the publication of the redemption notice any part of the sale, and has been so held by the Court of Appeals, in the case of *Doughty v. Hope*. (3 Denio, 603, & 1 Comstock, 79.) The omission to publish such notice cannot affect the legality of the sale—although it may defeat the purchasers' title. 4. The ordinance of the Common Council can in no wise prejudice the defendant.

II. The right to take private property in the city of New York, for public streets, and to charge the expense as a debt or liability upon the owners of property interested, is a naked power confided by the legislature to the Corporation. (*Mount Morris Square*, 2 Hill, 24. *Sharp v. Spier*, 4 Hill, 83 and 86. *Striker v. Kelly*, 7 Hill, 25. 6 Wheaton R. 119. 13 *Sergt. & Rowl.* 508.) 1. This power is given by the R. L. of 1813, page 408, §§ 177, 178, 179, 182, 185, 186, and some subsequent statutes. These statutes are intended to form a complete system upon this subject (*Striker vs. Kelly*, 7 Hill, 13), and to give power to the Corporation to take land for streets, to lay assessments therefor, and to force the collection of the assessments. 2. The assessment, when confirmed by the Supreme Court (which is one of the means given by statute to carry out this power), becomes a debt or liability against the party assessed, in favor of the Corporation, and is made a charge or lien on the particular property described in the Commissioners' Report. (2 R. L. 420, § 186.) 3. When the statute gives a power, and at the same time provides the means of executing it, those who claim the power, can execute it in no other way. So if the act has prescribed the remedy for the party grieved, and the mode of prosecution—all other modes and remedies are excluded (*Dudley v. Mayhew*, 3 Comstock R. 15 and 16, and the authorities there referred to.) 4. The statute has provided all the remedy necessary to enforce the power, and collect the

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assessments, to wit, 1. By distress of the goods and chattels of the party assessed in the name of the corporation. (2 R. L. 420, § 186.) 2. By action of debt or assumpsit, § 186. 3. By sale of the lands on which the lien is charged by the statute. (2 R. L. 442, § 259. Sess. Laws of 1816, p. 114, § 2.)

III. The power given by statute to the Corporation to enforce this lien, has been by the plaintiffs fully executed, by the sale of the lands, that being one of the modes prescribed by law. 1. The sale was valid, and conveyed a perfect but conditional title for the term purchased. 2. When the money was paid by the purchaser, it satisfied the debt to the corporation, principal and interest. The assessment was fully paid, and the lien discharged. 3. If once discharged, the statute provides no revival of the lien, and the common law does not imply one in favor of the party who lost his remedy, not by accident or failure of paramount title, but by his own fault. It is analogous to discharging goods levied upon by execution, sufficient to pay the execution. Or a sale of said goods, under the execution. (2 Lord Ray, 1072. 1 Salk. 322. 4 Mass. 403. 7 John. 428-9.) The land is discharged from its lien. (*Hoyt v. Hudson*, 12 John. R. 207. *Ontario Bank v. Hallett*, 8 Cowen R. 192. *Flagg v. Dryden*, 7 Peck R. 52. *Jackson v. Bown*, 7 Cowen R. 13. *Ex parte Lawrence*, 4 Cowen, 417. *Forsyth v. Clark*, 3 Wend. 637. *De la Vergne v. Evertson*, 1 Paige R. 181. *Marvin v. Vedder*, 5 Cowen, 671. *McArthur v. Porter*, 1 Hammond R. 44.

IV. The statute of limitations applies: 1. The action of debt or assumpsit, founded on the statute liability upon the assessment, was limited within six years, under § 18, 2 R. S. 295 and 296. (7 Wheat. R. p. 115, 117, 119.) After six years, the policy of the statute and its words forbade an inquiry into the existence of the debt. 2. The action for the debt being gone, the lien for it by way, not of possession but of charge, passed away with it. 3. Equity must follow the law in this as in other cases of remedies lost by staleness and neglect.

V. The present action is in the nature of a foreclosure suit in equity, and is not authorized by statute.

CAMPBELL, J.—The first question is what was the operation

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of the original proceedings for the widening of John street on the land in question, belonging to the defendant. It was contended by the counsel for the defendant that the lien was not in the nature of a mortgage, because § 223 of the general act, passed April 9, 1813, did not apply; that such general act simply operated to reduce the several laws previously existing in relation to the city of New York into one act, and that no new powers or rights were given to the plaintiffs thereby, except in any case where there was some new provision; that § 223 was simply a re-enactment of part of the act of 1801, and therefore the expression, "or shall hereafter be assessed by virtue of this act," must be construed to mean by virtue of the act of 1801, and not of the general act of April 9, 1813. Conceding, for the argument, that this construction should be given to § 223, we do not see that it makes any difference. The act of 16th April, 1787, § 1, authorizes the plaintiffs to make ordinances, rules, and orders, and among other things, for "regulating and altering the streets, wharfs, and slips, in such a manner as shall be most commodious for shipping and transportation." The first section of the act of 3d April, 1801, also permits that the plaintiffs may make by-laws and orders for "regulating and altering the streets, &c.," and § 6 of this act of 1801 is in the precise words of § 223 of the act of 1813, except there is added in § 223 the title of the act of 1801, whereby the assessments and charges under the act of 1787, and under the act of 1801, are made to operate as liens precisely as they were by the passage of the act of 1801. By the acts of 1787 and 1801, re-enacted in 1813, power was given to the plaintiffs to alter and regulate streets, and the money expended by them for that purpose was to be a lien and charge upon the houses and lots, in respect to which assessments were made, and might be sued for and recovered in like manner as if such houses and lots were mortgaged to the plaintiffs. By subsequent acts, and especially by the acts of April 5th and April 16th, 1816, various provisions are made as to the manner of proceeding, and as to the mode of assessing the damages, and as to the extent of land on either side of the street so to be assessed. But the original power to alter and regulate streets, and the right to have the expenses and charges of the plaintiffs

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for such alteration or regulation a lien upon the houses and lots assessed, as if they were mortgaged, appears in no subsequent act to have been taken away. The manner in which the assessment should be enforced, the extent of property which it should reach, were altered, but the original security to the plaintiffs for their expenses and charges remained under the old acts by and through which the power was derived, and remained to them to make such alterations and regulations. I think, therefore, that in this case the plaintiffs acquired the lien contemplated by § 223 of the act of 1813. But if there was any doubt it seems to be clear that under the provisions of the act of February 21, 1824, amending the act of 1813, such doubt must be removed. This act of 1824 was not cited to us on the argument. It however provides that in all cases where expenses are incurred by the corporation, under the provisions of the act of 1813, such expenses shall be a lien as if mortgaged, and the provisions of § 271 of act of 1813 are made applicable. (Act Feb. 1, 1824, p. 768.) Then has such lien been discharged by the sale, and if it has not, is the right of the plaintiff to enforce it barred by the statute of limitations?

The lien on the defendant's house and lot for the assessment, "shall bear lawful interest until paid, and shall be entitled to a preference before all other incumbrances upon the same, and may be sued for and recovered with costs in like manner as if the said houses and lots were mortgaged to the mayor, aldermen, and commonalty, for the payment thereof," § 223 act of 1813, and § 6 act of 1801. The lien is specific, not general, and is the same as if the lot originally assessed was mortgaged to the plaintiff. If, then, there had been an actual mortgage executed by the defendant to the plaintiffs, the house and lot would have been discharged from that mortgage lien, either by payment or by a tender of payment of the amount. The defendant himself neither paid nor tendered the amount. The plaintiffs then proceed to sell, and the proceedings to enforce the collection of these assessments are somewhat analogous to a statute foreclosure of a mortgage. The purchase at auction was made by a stranger, who paid the amount of the assessment and costs, and received a receipt therefor, stipulating that

at the expiration of two years he would be entitled to a lease of the premises. The lease was never given, because the plaintiffs, after the sale at auction, did not take the further necessary legal steps to make such sale effectual, so that a good title could be given by them to the purchaser. And on demand made by the purchaser the plaintiffs returned to him his purchase money. There is no pretence on the part of the defendant that he has ever been in any way disturbed in his possession of the premises. He has manifested no desire to relieve his property from the lien by payment, or offer to pay the amount expended by the plaintiffs for his benefit. Suppose, in case of a sale of mortgaged premises by advertisement, they should be struck down to a stranger, who should pay the amount and take a receipt therefor, with a stipulation that the deed of the property should be given to him at a future day, and then for any reason occurring thereafter it should be agreed between the mortgagee and the purchaser that the sale should be abandoned, could it be said that thereby the mortgagee would lose his lien? It might be that if there should be a loss on a resale, the owner of the equity of redemption might recover damages, though that is doubtful. The case is widely different where there is payment, or tender of payment by the mortgagee, where the effect is to draw from the mortgagee and revest in the mortgagor all the right and interest held by the mortgagee. In the case of a sale by the mortgagee under his power of sale, to a stranger, the effect is to transfer all the title and interest of both mortgagor and mortgagee to such stranger, and the lien is necessarily discharged by the operation. But in case of payment, or tender, the estate of the mortgagor becomes again complete and perfect, because he has done all that is required of him, and it is inequitable, after he has paid the debt, or is ready to pay, and has been tendered the amount, that the creditor should still retain a lien. But when the debtor stands by, and sees the creditor bargain with a stranger, and neither pays nor offers to pay, and the effect of such a bargain, when completed, would be to carry away the debtor's title, it can hardly be said that if for any reason such bargain falls through, whereby the debtor is not divested of his estate, or even of its temporary possession, that he can then set up such bargain in

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bar of the creditor's lien. Viewing this lien as in the nature of a mortgage, I cannot think it was discharged by the sale mentioned in the case.

The proceedings for opening, altering, and widening streets, §§ 177, 178, act of 1813, are taken in the Supreme Court, and become matter of record, and the lien created thereby being in the nature of a mortgage, I cannot see how the statute of limitation can be a bar; at all events, I think the presumption of payment cannot arise until the lapse of the twenty years, as in case of a judgment.

I am of opinion that there should be judgment for the plaintiffs for the amount of the original assessment, with interest and costs.

BOSWORTH, J.—The terms of § 223, of the “Act to reduce several Laws, relating particularly to the City of New York, into ONE ACT,” passed April 9, 1813, are sufficiently comprehensive to embrace the assessment in question:

Whether this section is applicable to this particular assessment, depends upon the question whether it relates to sums assessed in the “Opening and Laying out *Streets, &c.*” (id. § 177, p. 408), or relates solely to sums assessed in laying out and regulating “*Wharves, Piers and Slips* :” id. § 219, p. 431. The section is found under that part of the general act which contains provisions specially relating to the latter subject.

The section declares that every sum theretofore assessed by virtue of the act entitled, “An Act for REGULATING the buildings, STREETS, wharves, and slips, in the City of New York,” passed April 16, 1787, or by virtue of an act with the *same title*, passed April 3, 1801, and not refunded, or that should “thereafter be assessed by *virtue of this act*, shall be a lien or charge upon the houses and lots in respect to which such assessments shall have been made, and shall bear lawful interest until paid, and shall be entitled to a preference before *all other* incumbrances on the same, and may be *sued for and recovered in like manner*, as if the said houses and lots were *mortgaged to the Mayor, Aldermen and Commonalty for the payment thereof: Provided always*, that nothing herein contained shall extend to charge any such houses or lots, which

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may have been *bonâ fide* sold and disposed of *after* the making of such assessment therein and *before* the 3d of April, 1798."

By reference to the two acts recited in the preceding part of this section it will be seen that sums assessed by virtue of those acts "for regulating and altering," "pitching and paving," and "the altering, amending, cleansing and scouring of any street" within the city, are, by the express terms of § 6 of the act of April 3, 1801, not only made liens and charges on the houses and lots assessed, having a preference before all other incumbrances upon the same, but it is declared that they may be sued for and recovered with costs, in like manner as if the said houses and lots were mortgaged, &c., for the payment thereof: (§§ 1 and 4 of act of April 16, 1787, and § 6 of act of April 3, 1801.)

The act of 1787 made provision for ascertaining and assessing upon the owners and occupants of houses and lots to be benefited by the "altering and amending of any street, the expenses of the improvement, and for the collection of the same by distress-warrant"—(§ 4 of *id.*)

The act of 1801 has the same title as that of 1787, viz. "An Act for *regulating* the Buildings, Streets, Wharves and Slips in the City of New York."—The 6th section of the act of 1801 is in the same terms as the 223d section of the act of 1813. The 1st section of the act of 1801 declares in the broadest and most unqualified terms that every sum that should thereafter be assessed by virtue of that act, among the owners or occupants of any houses and lots, might be sued for and recovered in like manner as if said houses and lots were mortgaged for the payment thereof. It also made the same provision with respect to every sum previously assessed under the act of 1787. But it provided, as § 223 of the act of 1813 does, that any such houses or lots, *bonâ fide* sold and disposed of before the 3d of April, 1798, should not be affected or charged by any assessments prior to the last named date. The cause of this proviso and the reason of fixing upon the date of April 3d, 1798, are found in the fact, that the fourth section of the act of April 3d, 1798, entitled "An Act concerning certain streets, wharfs and piers, and the Alms-house and Bridewell in the City of New York," provided that the sums to be expended under the latter

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act as therein provided, and also all and every sum and sums of money, which have been or shall at any time or times hereafter be assessed among the owners or occupants of any houses and lots by virtue of the said act entitled "An Act for regulating the buildings, streets, wharves and slips, in the City of New York" (being the act of April 3d, 1787), shall be a real incumbrance, &c." (the residue of the section being in the precise language of § 223 of the act of 1813, excepting that the proviso of the act of 1798 declares that nothing contained in it, "shall extend to charge any such houses or lots, which may have been *bona fide* sold and disposed of, after the making of such assessment thereon, and *before* the passing of *this act*).

This act made all assessments, whether prior or subsequent, for the regulating and altering of streets, under and by virtue of the act of 1787, a first lien on the houses and lots assessed, and provided for their collection as if such houses and lots had been actually mortgaged for the payment thereof. The fourth section of it, which contains this provision, is the same in terms as § 6 of the act of 1801, and § 223 of the act of 1813. The exemption contained in the proviso of each operates upon sales *bona fide* made before the date of April 3rd, 1798.

From the 3rd of April, 1798, down to April 9th, 1813, whatever other remedies may have been provided for collecting assessments made upon houses and lots to defray the expenses of regulating streets, it is clear that the remedy invoked in this case was expressly given by § 4 of the act of 1798, and by § 6 of the act of 1801.

The act of 1813, as its title declares, was an act to reduce into "one act" several laws relating particularly to the City of New York. The 223rd section of it is a copy of § 6, of the act of 1801. Construing it according to the natural and obvious meaning of its terms, it would be applicable to the assessment in question. Holding it to be applicable is holding that the law on this point continued the same after the act of 1813 was passed, as it was prior thereto.

But if it be construed to embrace only such future assessments as should be made to defray the expenses of laying out "wharves, piers and slips," then it will not embrace every assessment which shall hereafter be made by virtue of this act,

nor a large class of assessments to which it related by the express provisions of the act from which such section was copied. I perceive no good reason for giving to the words "by virtue of this act," the restricted meaning they must receive if construed as if reading, "by virtue of *that part* of this act relating to wharves, piers and slips only," when that section, by the terms of the several laws so reduced to one act, related to and included assessments like the one in question.

I cannot resist the conclusion that this assessment by force of § 223 of the act of 1818, may be sued for and recovered in the same manner as if the premises on which it was imposed had been actually mortgaged to the plaintiffs for the payment thereof.

If that conclusion be correct, it would seem to follow as a matter of course that the plaintiffs are entitled to the same remedies by action, and to the same relief in it, as if a mortgage had been in fact executed: they would be entitled, unless some of the other grounds of defence are well taken, to such a judgment, as would be proper, if the assessment was secured by a mortgage of the lot assessed, and this was an action to foreclose such mortgage.

The act of February 21st, 1824 (47th session, vol. 6, c. p. 39), if still in force, may perhaps entitle the plaintiffs to the relief prayed for in this action, even if § 223 of the act of 1813, formed no part of the latter act.

The act of 1824 provides that §§ 270 and 271, of the act of 1813, "shall apply to all and every the laws, ordinances, orders, and directions which the said corporation are authorized to make under and by virtue of *any part or section* of the afore-said act" (the act of 1813), "or of any other act or acts of the legislature."

Section 270 declares it to be lawful for the Corporation to cause all work, ordered by by-laws and ordinances relating to certain subjects, to be executed at their own expense, on account of the persons on whom the same may be assessed, and § 271 declares any such expense which the Corporation may pay, to be a real encumbrance upon the houses and lots, in respect to which such assessments shall have been made, and to be recoverable in like manner as if the houses and lots

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were mortgaged to the Corporation for the payment thereof.

If, in point of fact, the work ordered to be done in "widening and straightening *John street*, between *Broadway* and *Pearl street*, in the second ward of the City of New York," and in respect to which the assessment now sought to be collected was imposed on the defendant's lot, was done, and the expense of it paid by the Corporation, then the act of 1824 makes the expense a lien on the lots assessed, and recoverable as if such lots were actually mortgaged for the payment thereof. I do not discover that this act has been repealed. But whether it has been or not, I think the plaintiffs are entitled to recover for the reasons previously stated, unless some of the other objections urged against a recovery are well taken.

It is objected that, as the land was sold for enough to satisfy the assessment, and as the sale itself was regular, the payment by the purchaser of the amount of his bid satisfied the encumbrance, and that it is the fault or neglect of the plaintiffs that the redemption notice was not published at the proper time; that the lien was for a time at least actually discharged, and cannot be revived.

There was no effectual sale; that a title under it was not perfected cannot, on the papers before us, be attributed to any bad faith of the plaintiffs' agents, nor to any want of efforts designed to comply with the law. It resulted from their erroneous construction of the law in relation to the time when the redemption notice should be first published.

The defendant, so far as the papers disclose, has not been prejudiced by the ineffectual efforts of the plaintiffs to collect the assessment by a sale of the lots assessed; he has not been disturbed in his possession, nor in any other full enjoyment of his property for a day or an hour. It seems to me unreasonable to hold that the plaintiffs ever received, even for a moment, absolute satisfaction for their debt. They received a conditional payment, and only that. Even that was lost by misjudging the law. (*Doughty v. Hope*, 3d Denio, 598.)

The plaintiffs have not, in fact, had actual satisfaction, and the defendant has not paid any part of the assessment, nor been injured by the abortive attempt made to collect it. Un-

less the debt is outlawed he is liable to pay it, and the lot assessed is yet encumbered by it.

It would be against the obvious policy of these acts to hold the debt outlawed. In the first place, the act of 1813 (§ 223) declares that sums theretofore assessed under the acts of 1787 and 1801, shall be first liens on the lots assessed, and that the sums assessed may be collected as if the lots were mortgaged for the payment thereof, and only such lots as were *bonâ fide* sold and disposed of before the 3d of April, 1798, are exempted from its operation. As against the original owner of the lot assessed, an assessment made in 1787, twenty-six years previously, would be a lien.

So section 4 of the act of April 3d, 1798, made assessments imposed under the act of 1787, liens of the same character, and collectable in the same manner, notwithstanding there was no similar provision in the act of 1787. The effect of this might have been to make assessments of more than ten years' standing liens of like effect, and in respect to which the plaintiff would have the like rights and remedies, as in any case confessedly within § 223 of the act of 1813, subsequently arising. It is obvious then that it is no part of the policy of these acts to apply either six or ten years' limitation to the liens created by such assessments.

It being against the obvious policy of the acts, no such rule of limitation should be applied, unless required by positive law. The defendant's property, according to the theory of these acts, has been exclusively benefited to the amount assessed on it. Neither he nor his property has paid it. It should not be paid by the great body of tax-payers, unless it is so provided by law.

This assessment is not technically a judgment, yet its validity, other things being regular, depends upon the question whether the report, ascertaining and fixing it, has been confirmed by the judgment of the Supreme Court, a court of record. It is a case falling within the spirit and equity of the provision, respecting the presumptions of payment, applicable to judgments of a Court of Record.

The provision that the sums assessed "may be sued for and recovered in like manner as if the said houses and lots were

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mortgaged to, &c., for the payment thereof," may relate solely to the forms of proceedings by suit, and of the judgment to be rendered thereon, and not have been designed to indicate or imply that the lien should continue as long as if there had been an actual mortgage to secure the debt.

But I find no express statutory provision in the way of holding in conformity with the obvious policy of the acts, and the justice of the case, that the presumption of payment shall not operate as a bar within a less period than that within which it can be applied to judgments of courts of record or mortgages of real estate.

On the whole case, I am of the opinion that the judgment appealed from should be reversed, and such a judgment rendered for the plaintiffs as would be proper in a suit to foreclose an actual mortgage of the lot in question, executed to secure the assessment now sought to be recovered.

EMMET, J., concurred.—Judgment for plaintiffs with interest and costs.

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A covenant in a contract for the sale of lands that the premises "shall be free and clear from encumbrances," if a conveyance is thereafter delivered to, and accepted by the purchaser, is merged in the deed.

If an incumbrance is thereafter found to exist, which the purchaser is forced to satisfy, his sole remedy is against his grantor upon the covenant in the deed.

These rules apply, even where the agreement to sell the lands is made by one person, and the deed is given by another, and when the agreement contains a provision that the consideration is not to be paid until "it can be ascertained that the title to the premises is good, and unencumbered."

Such a provision makes it the duty of the purchaser to examine the title before he accepts the conveyance, and is evidence of the understanding of the parties that the delivery and acceptance of the deed covenanted to be given, would be a fulfilment and discharge of the agreement.

Upon these grounds a verdict taken for the plaintiff, subject to the opinion of the court, set aside, and a verdict and judgment thereon entered for the defendants.

(Before CAMPBELL, BOSWORTH, and EMMET, J.J.)

December 10, 1852; February 26, 1853.

THE action was brought to recover damages for the breach of a covenant in an agreement between the parties for the sale and conveyance of a house and lot in the city of New York. It was tried before Mr. Justice Sandford and a jury, in May, 1851.

The following are the material facts proved on the trial—The plaintiff and defendant, on the 10th of September, 1851, signed and sealed a memorandum of agreement whereby the defendant agreed to sell and the plaintiff to buy the premises known as No. 34 West 19th street in the City of New York for the sum of \$14,000. The property to be conveyed subject to a mortgage, and the balance to be paid by plaintiff "as soon as it can be ascertained that the title to said premises is good and unencumbered except as above stated, and upon a production to him of a good and satisfactory warranty deed executed in due form of law." The defendant on his part covenanted and agreed "that the said premises shall be free and clear from all encumbrances save the said mortgage, and that he will procure and deliver to the said party of the second part a good and *satisfactory* warranty deed for such premises subject as aforesaid."

On the 15th day of November, 1851, a deed of the premises was executed by one John Lovejoy to the plaintiff's wife, and which deed was dated on the 4th of June, 1851, and contained no covenant except against grantor's own acts, that he had not done or suffered anything to be done by which the premises were or could be encumbered. The legal title was in Lovejoy. The defendant acted as agent for the firm of Henry and Meyer, who were the equitable owners. The deed was delivered and accepted by Carr without objection.

In July, 1851, after the date, but before the delivery of this deed, a tax was imposed upon the premises, which the plaintiff paid, and alleges he was compelled to pay.

He claimed to be entitled to recover as damages the amount so paid with interest. When the testimony was closed, there being no disputed facts, the judge ordered a verdict to be entered for the plaintiff for \$129.34, the damages claimed, subject to the opinion of the court upon a case to be argued at

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general term, with the usual liberty to turn the case into a special verdict or bill of exceptions.

J. E. Burrill, for plaintiff.

I. The agreement on which the action is founded, was not discharged by the execution of the deed. 1. The covenant made by the defendant, that the premises shall be free and clear from all encumbrances, is a personal independent covenant, and distinct from his covenant to procure a deed for the property. 2. The defendant was not the owner of the property, as the parties well knew, and his covenant was an additional security to the plaintiff. 3. The deed was not executed by the defendant, nor has he executed any instrument subsequent to the agreement. The defendant is not liable on the deed, but only on the agreement. 4. The deed was not executed to the plaintiff. He has no individual right of action from the deed. 5. The deed contains no covenant against encumbrances—which shows that the covenant of the defendant was not intended to be discharged. (*Bogart v. Buckhalter*, 1 Denio, 175.)

II. The plaintiff was not a stranger, nor the payment by him voluntary, but it was in law compulsory. 1. Plaintiff, by the agreement, assumed the payment of the mortgage of \$8,600, and the existence of prior encumbrances increased his responsibility and risk. 2. Taxes, though imposed subsequently to a mortgage, have a priority of lien, and the mortgagee on paying them, is entitled to recover them from the mortgagor, or the party representing him. 3. The plaintiff paid the consideration for the deed, and whether the deed was executed to his wife as a gift or as a purchase, it was done at the request of the plaintiff and under the assumption that it was unencumbered, and he had a right to have his intentions or his agreement carried out or fulfilled. 4. The plaintiff, as husband of the grantee, had sufficient interest in the property to pay off an encumbrance. He is entitled to judgment upon the verdict, with costs.

J. Graham, for defendant.

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I. The agreement for the sale of the property was a memorandum of what the parties were to do. It stipulated for a specific kind and time of execution. If not executed as required, it was then broken; but if the plaintiff chose to receive a different kind of performance as and in execution of it, the defendant's covenant was discharged. To have entitled himself to sue the defendant upon his original covenant, he should have put him in the position of refusing a strict performance of it—i. e. in giving such a deed as was required.

II. The agreement was merged in the execution of the deed to the plaintiff's wife. Such a departure from the original platform, not only as to the person of the grantee or vendee, but as to the form or kind of conveyance, operated its entire destruction. It was a complete waiver of it.

III. Even if the agreement could be made the basis of the present action, it imposed a duty upon the plaintiff of ascertaining whether the property was clear and unencumbered; and any oversight on his part was at his risk. The whole agreement is to be looked at, and its intention (which was plainly this) is to be carried out.

The defendant agrees, "as soon as it can be ascertained that the title, &c., is good and unencumbered, &c., and upon production to him (the plaintiff) of a good and satisfactory warranty deed," &c. The plaintiff stipulates for the right to judge of the sufficiency of the title, *alivnde* the deed, and also of the sufficiency of the deed in form, and this before he is under an obligation to receive the property.

It is plain the plaintiff intended to have something more than the covenant of the defendant, that the title should be good. Suppose the title to have been bad, and still a warranty deed to have been tendered, would the plaintiff have been bound to receive it, and pay the consideration? How, then, can he hold the defendant liable on the original agreement, when, by taking a deed at all, he pronounces the title to be good and satisfactory?—or satisfactory—that is enough.

IV. If the plaintiff is correct in his position, he has got more than the agreement called for; for, according to him, the defendant is liable to him under the covenants in the agree-

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ment, and the grantor in the deed (Lovejoy) is liable to his wife on the covenant in that instrument.

We say that by taking the deed from Lovejoy, every covenant in a warranty deed not in his was waived, and that his personal responsibility was substituted in the place of the defendant's.

V. The plaintiff, in paying the alleged tax, did so in his own wrong. He was not the owner of the property, and his act was purely voluntary. He had no legal interest of any description to protect.

For cases where a party has been allowed to recover money paid under coercion, see *De Lavergne v. Morris*, 7 Johns. 358. *Hall v. Dean*, 13 Johns. 105. *Stanard v. Eldridge*, 16 Johns. 254.

BY THE COURT. CAMPBELL, Justice.—In *Houghly v. Lewis*, 10 John. 297, it was said by Mr. Justice THOMPSON, in delivering the opinion of the Court, that “parties may no doubt enter into covenants collateral to the deed, or cases may be supposed when the deed would be deemed only a part execution of the contract, if the provisions in the two instruments clearly manifested such to have been the intention of the parties.” And the same learned judge had before said, in *Harris v. Barker* (3 John. R. 509), that “the deed cannot be considered as an execution of the contract in part only. If an execution at all, it must be of the whole contract, and the articles of agreement are a nullity;” and this was the doctrine held by him in *Houghly v. Lewis*. Indeed the general principle is well settled that all negotiations between the parties prior to or contemporaneous with the execution of a deed are merged in it (*Patterson and others v. Hull and others*, 9 Cowen, 747). I am inclined to think that the true distinction was taken by Justice WELLES, in *Bull v. Willard*, 9 Barbour, 641, that in all cases the execution and delivery of the deed operate as a merger of the contract on the part of the grantor except where the covenants in the contract are collateral and independent, and not such as look to the title, possession, quantity, or emblements of the land.

In this case, as in *Bull v. Willard*, there was a tax on the property—a lien on the premises to be conveyed. It does not

appear that the defendant had any knowledge of it. He had agreed to procure and deliver a good and satisfactory warranty deed. He procured and delivered a deed containing a covenant against the grantor's own acts, and it was accepted by the plaintiff. It appears to have been satisfactory to him, as no objection was made by him or his attorney who was present at the time of the delivery of the deed.

The counsel for the plaintiff relied upon the case of *Bogart v. Buckhalter* (1 Denio, 125). But that case simply determines that a conveyance by the vendor does not operate to relieve the vendee from his covenants contained in the agreement. The performance of a contract by one party to it is not in judgment of law a performance by the other. The general principle then deducible from all the cases in this State would seem to be this, that where there is a contract for the conveyance of land and a deed is subsequently executed and accepted by the vendee, it operates, so far as the vendor is concerned, as an execution and merger of the contract, except there may be covenants in the contract which are collateral, and not connected with the title, possession, or quantity of the land. But on the other hand, the acceptance of the conveyance does not discharge the vendee from his covenants in the contract. He may still be liable as in the case of *Bogart v. Buckhalter*, to erect a brick house on the lot which he had stipulated to do by the terms of his agreement to purchase. He might still be compelled to pay the purchase money, if it remained in whole or in part unpaid after the execution of the deed, and this according to the amount agreed upon in the contract. In the case before us there is no hardship in the application of the rule. The defendant, it seems, acted as agent. He was to procure and deliver a deed. The plaintiff was to pay as soon as it "can be ascertained that the title to said premises is good and unencumbered." The contract contemplated that the plaintiff should examine and ascertain whether the title was good, and whether the premises were unencumbered. The lien in question was a recent tax, and its existence could easily have been ascertained. It might be a great hardship under such circumstances to hold the defendant liable upon his contract when a deed has been given and accepted without objection, and when

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the agent may have settled and paid over the proceeds to his principal. It is unnecessary under this view to consider whether the plaintiff having himself no title to the premises, the same having been conveyed to his wife, can bring an action on the contract, he not having been compelled to pay the same.

We think that the verdict for the plaintiff must be set aside, and a verdict and judgment thereon be entered for the defendant with costs.

GEORGE F. NESBIT v. JAS. STRINGER and WM. A. TOWNSEND.

When a sum of money paid to an agent is credited by the principal, the credit so given is sufficient proof of the authority of the agent, so as to entitle the person making the payment to prove under what circumstances, and upon what account it was made.

When the liability of a defendant is sought to be proved by his verbal declaration or admissions to a witness, all the conversations between him and the witness, bearing upon the subject of the controversy, must be submitted to the consideration of the jury.

(Before CAMPBELL, J., BOSWORTH and EMERY, J.J.)

December 13, 1852; February 26, 1853.

MOTION for a new trial upon a bill of exceptions ordered to be heard at general term.

The action was for the recovery of a printer's bill, and was tried before Mr. Justice PAINE and a jury, in April, 1852, and a verdict rendered for the plaintiff for \$152.80.

The case upon the pleadings and evidence is as follows:—

In April, 1850, F. U. Upton wrote a pamphlet in relation to the trial of Professor Webster, of Boston, and employed the plaintiff to print 2,000 copies of it. After they were printed he applied to the defendants, publishers in this city, to make publication and sale of it. They agreed to do so for the usual compensation, but declined to take any risk of its publication, or assume any liability in respect to the expense incurred for printing it. Mr. Upton reserved four or five hundred copies

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for himself, and the remainder were sent to the defendants for sale.

The pamphlet sold well, and when nearly the whole number of copies sent to the defendants had been disposed of, Mr. Upton had a second interview with Mr. Stringer, one of the defendants, at their store, in which Mr. Stringer informed him that this first edition, or the greater part of it, had been sold, and that the defendants had orders for further copies, and requested him, Mr. Upton, to order a second edition of 3,000 copies. Mr. Upton told him he would give the order for the second edition in the morning. Mr. Stringer desired him not to delay it till then, but to give the order on that afternoon, lest they might take down the form from which the first edition was struck off. Mr. Upton thereupon went to the plaintiff's office, and gave the order for printing 3,000 additional copies.

On the following morning a third interview took place between Mr. Upton and Mr. Stringer. Mr. Stringer called upon Mr. Upton and asked his permission to have printed on the cover of the second edition an advertisement of Stringer and Townsend, the defendants. Mr. Upton made no objection, but referred Mr. Stringer to the plaintiff, stating that the printer had more to do with it than he had.

The plaintiff printed the second edition, and it was delivered to the defendants in May, 1850, without their advertisement on the cover.

About this time Dr. Webster's confession came out, which put an end to all speculation as to his guilt, or public interest as to the fairness of his trial, or legality of his conviction. The consequence was that a remnant of the first edition, and the whole of the second, remained from that time in the hands of the defendants unsold.

On the 15th Oct. 1850, Mr. Upton gave a written order upon the defendants in the following words:—

“MESSRS. STRINGER & TOWNSEND,

“Please account and make settlement with Mr. William Taylor of the proceeds of sale of the pamphlet, called ‘State-

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ment of Reasons, &c., in relation to Prof. Webster's trial, and oblige yours,

"FRAS. H. UPTON."

And on the 1st February, 1851, Mr. Upton added the following to that order:

"The foregoing order, in favor of William Taylor, was given to enable Mr. Taylor to make settlement with Messrs. Stringer & Townsend, not for his own benefit. He not having done so, the same is cancelled in favor of George F. Nesbit, Esq., in conformity with the order heretofore given to him for bill of printing the pamphlet alluded to."

On the 10th of April, 1851, a person in the plaintiff's employ presented to the defendants an account or bill for the printing of the pamphlet, and applied to them for the settlement of it. Mr. Stringer looked at it, and utterly refused to recognize it, but said he would account for the books sold, and paid him \$92 69 on account of the pamphlet.

Neither the account presented on that occasion, nor the receipt given for the \$92 69, were produced on the trial. The complaint in this action (which was commenced in May, 1851) claimed from defendants \$172 71 as the balance due for the printing, &c., of both editions, after crediting defendants with \$92 69, paid on the 11th April, 1851; but the plaintiff on the trial withdrew all claim against the defendants for the printing, &c., of the first edition. The allegation in the complaint, in regard to the second edition, is that the defendants requested the plaintiff to print and furnish to them an edition of 3,000 additional copies on their own account, and promised to pay plaintiff for the same; and it appears, from the account or bill of particulars annexed to the complaint, that the plaintiff's bill for printing the second edition amounted to \$152 80, the correctness of which was not disputed.

The defendants on the trial offered to prove by their book-keeper—

1st. That the person who called on them on behalf of the

plaintiff, on the 10th April, 1851, received the \$92 69 in full of all claim against the defendants for or by reason of the pamphlet in question, up to that date.

2d. That a statement of the accounts of the defendants, in connexion with this pamphlet, was exhibited to such person, and that it was on that basis that the \$92 69 were paid to and received by him, and a receipt given.

The court excluded the evidence mentioned in both those offers, on the ground that no authority was shown to such person to give a receipt in full.

3d. That such person was notified and told to inform the plaintiff that there remained 3,117 copies of the pamphlet in the hands of the defendants, and that they were subject to the plaintiff's order, and that defendants made no claim to them whatever.

The court also excluded this, and the defendants' counsel excepted to the decision, as to these three offers.

The judge charged the jury, that the question for them to decide was whether the defendants undertook the printing and publication of the second edition on their own account, and ordered the printing on their own account.

That the meaning of Stringer, in what he said in giving Mr. Upton the order for the printing, or Mr. Upton's understanding of it, were not to be their sole guides in deciding what that order was. That the true rule was, what would a person reasonably have understood from what he said; or in other words, what, under the circumstances of the transaction and of the parties to it, was the fair construction of what the defendants said. And by the circumstances of the transaction, and of the parties, he meant all that had taken place by or between the parties, as proved in the case in relation to the printing and publication of the pamphlet, from Upton's first seeing Stringer and Townsend, until the second interview, at which it was alleged the printing of the second edition was ordered.

The defendants' counsel requested the court to charge the jury, among other things, that the jury were to construe the language of Mr. Stringer, in the second conversation, with reference to what was said in the first interview, and that all the

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conversations were to be taken together for the purpose of determining the legal effect of what was stated in the second interview.

The judge refused to charge the jury as thus requested, otherwise than as contained in the charge above given, to which defendants' counsel excepted, and the jury found a verdict for the plaintiff for \$152 80, the amount claimed.

J. Graham, for defendants.

F. H. Upton, for plaintiff.

BY THE COURT. EMMET, J.—The first question to be examined relates to the exclusion of the evidence offered.

The order given by Mr. Upton on the 15th October, 1850, and its subsequent modification on the 1st February, 1851, taken together as they necessarily must be, mean simply a direction by Mr. Upton to the defendants to account and make settlement with the plaintiff for the proceeds of the sale of the pamphlet to this end that his bill for printing should be therewith paid; and as the order was given long after the printing and delivery to the defendants of the second edition, it related to the proceeds of sale of both editions. It admits of no other construction: and without stopping to consider how an order on the defendants for the proceeds of sale of the second edition can be reconciled with the claim that several months before, the defendants had ordered that edition on their own account and as their own property, and for their own benefit, let us examine what the effect of that order was as to the transaction between the defendants and the plaintiff's agent on the 10th April, 1851, and as to the propriety of excluding the evidence offered by the defendants of what took place on that occasion.

The plaintiff had no interest in the proceeds of the sales of the pamphlet, except as a fund to be applied to the payment of his bill for printing, &c. Mr. Upton's order shows this distinctly on its face.

The authority therefore which he obtained by the order was to demand from the defendants an account and settlement of the proceeds in order that they might be so applied; and his

agent made application to the defendants, not as an ordinary collector of a bill against them, but as a person deputed by him to exercise the authority he had been vested with by Mr. Upton, that is to say, to get an account of the proceeds, and make a settlement as to whatever amount might on such accounting appear to be in their hands. The plaintiff by his own act has shown that he so considered it. If the \$92.69 were received an account of the bill for printing the second edition only, for which he alleges the defendants contracted with him, he was bound to have credited that payment exclusively to the expense of printing the second edition, but the bill of particulars annexed to his complaint shows that this credit was given upon the whole account, for printing both editions, and that it was received therefore as proceeds accounted for, towards the plaintiff's whole bill, and not as a payment on account of the bill for the second edition, or of any recognized or specific demand, which the plaintiff then claimed to have against the defendants. With these facts already in the case, the defendants had a right to show that a statement of their accounts in connexion with the pamphlet, was exhibited to the agent; that the money was received by him on that basis, in full of all claims against the defendants by reason of the pamphlet to that date; and that the defendants notified the plaintiff through such agent that the unsold copies in their hands were subject to his order, without any claim to them on their part; and the evidence offered by the defendants for that purpose was improperly excluded.

Second, as to the judge's charge. The evidence of Mr. Upton shows that he had three interviews with the defendants, or one of them, Mr. Stringer. That at the last of these interviews, which was on the morning after the order for printing the second edition had been given, Mr. Stringer asked permission to have an advertisement of Stringer and Townsend printed on the cover of the second edition, and that Mr. Upton made no objection, or in other words, consented, so far as he was concerned. Now the asking of this permission only one day after the alleged order, and the character of Mr. Upton's answer to it, are pretty strong "circumstances of the transaction and of the parties to it" in the language of the judge, to guide the jury in deciding not only what was Mr. Stringer's meaning and

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Mr. Upton's understanding of what Mr. Stringer said to him when he requested him to order the second edition, but also what was the fair construction of that request. For assuredly if the defendants had ordered the second edition on their own account, at their own risk, and for their own benefit, they required no permission from Mr. Upton or any one else, to have what they pleased printed on the cover; and the fair presumption is, that Mr. Upton would have told them as much, if he then considered that they had given such an order.

This third interview was the most important part of the *res gestæ* upon which the jury were to make up their verdict (except indeed the subsequent order given by Mr. Upton to the plaintiff on the defendants for the proceeds of sales), and instead of being excluded from the consideration of the jury it should have been directly brought to their notice.

It is no answer to this, to say that this conversation was after the order was given, and that the plaintiff was not present at it. Neither was he present at the second interview. Mr. Upton was the medium through which the order was given, if Mr. Stringer gave it; Mr. Upton was the witness called to prove it; and Mr. Upton must necessarily by his acts and language be the interpreter of it. The law is not so imperfect in its administration of justice as to give the plaintiff the chances of yesterday's uncertainty, and deprive the defendants of the benefit of to-day's explanation; and where the attempt is to fasten a contract on a party for a losing undertaking, by inference from circumstances and conversations, he has a right to ask at least, that *all* the circumstances and *all* the conversations relating to the matter should be taken into consideration.

The defendants' counsel expressly requested the court to charge the jury that *all* the conversations should be taken together for the purpose of determining the legal effect of what was stated in the second interview, but the judge instructed them that they were to be guided in this respect by all the circumstances that had taken place in relation to the printing and publication of the pamphlet from Upton's first seeing the defendants until the second interview at which it was alleged the printing of the second edition was ordered.

He therefore excluded from their consideration the conver-

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sation which took place between Mr. Upton and Mr. Stringer at their third interview; and upon that ground, the charge having been excepted to, as well as for the exclusion of evidence before referred to, the verdict should be set aside and a new trial granted.

HENRY L. PIERSON & SAMUEL HOPKINS v. ROBERT H. BOYD,
impleaded with ROBERT DAVIS.

R. D. for a good consideration made his promissory note to C., and B. endorsed the same for his accommodation. C. before the note attained maturity, endorsed and transferred it for value to the plaintiff, who brought the action against R. D. as maker, and B. as endorser.

Held, that whether C. was or was not liable to B. as first endorser, the latter was clearly liable as endorser to the plaintiff, the facts that the note was transferred to them by C., and that they knew B. to be an accommodation endorser, constituting no defence.

The sworn answer of the defendant B. admitted that he had received notice of the protest of the note, but alleged "the want of sufficient knowledge to form a belief whether or not he received due notice of said protest."

Held, that considering the answer as an affidavit, it was not such an affidavit as the statute requires in order to exclude the certificate of the Notary from being read in evidence.

It was proved that a notice in proper form was served on the right day at B.'s place of business by placing it under the door, but the witness did not state at what hour the service was made, nor whether the room was open or closed.

Held, that although this proof, if standing alone, would have been unsatisfactory, yet that connecting it with the admissions in the defendant's answer it was, as evidence of a due service, at least *prima facie* sufficient.

(Before CAMPBELL, BOSWORTH, & EMMET, J.J.)

December 15th, 1852. February 26th, 1853.

MOTION for a new trial on behalf of the defendant, Boyd.

This action was brought against him and Davis, upon a note dated September 25th, 1850, at nine months, for \$1,259, made by Davis, payable to the order of John Crum, and endorsed by Boyd first, and subsequently by Crum. The jury, under the direction of the Court, found a verdict for the plaintiffs, and assessed the damages at \$1,396 $\frac{1}{4}$, with liberty to defendants to make a case to be heard in the first instance at the General

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Term. The defendant Boyd now moves on a case made. From that it appears, that the complaint avers the making of the note by Davis, describing it, "and that said defendant, Boyd, then and there endorsed the said note in writing. And that said defendant, Davis, then and there delivered the note with said endorsement thereon as aforesaid, to said John Crum, who afterwards, and before said note became due and payable, duly endorsed same in writing to plaintiffs." It avers presentment at maturity, demand of payment, protest for non-payment, "of all which said defendant, Boyd, had due notice."

The answer of Boyd controverts the allegations in the complaint, except that it admits he endorsed a note made by Davis, September 25th, 1850, and that he "received notice of protest of such note, but denies having any knowledge or information sufficient to form a belief whether or not he received due notice of said protest, and he therefore controverts the allegation in that behalf."

It alleged an agreement made between Crum and Davis on the 5th of November, 1851, to give Davis six months' time to pay the note, that Crum was authorized to so agree, and that thereby Boyd was discharged.

It also sets up a failure of the consideration of the note, and that the plaintiffs held it as agents of Crum, and were collecting it for his benefit.

The new matter of the answer was put at issue by a reply. The issues made by the answer of Davis need not be stated. The action was tried on the 26th of May, 1852.

On the trial, the plaintiffs (the handwriting of Boyd being admitted, and that of Crum proved) read in evidence a note, and the endorsement thereon, as follows, viz. :—

"\$1,250."

"New York, September 25th, 1850.

"Nine months after date I promise to pay to the order of John Crum, twelve hundred and fifty dollars at the Ocean Bank, with interest, value received.

(Signed)

"ROBERT DAVIS."

(Indorsed)

"ROBT. H. BOYD,
JOHN CRUM,
PIERSON & Co."

Plaintiff's counsel then offered in evidence the notary's certificate of the protest of the note and of service of notice on Boyd as endorser. To this Boyd's counsel objected "on the ground that such certificate was not evidence of the facts contained therein, the defendant Boyd having denied, under oath by his answer, receiving due notice of non-payment of said note. The objection was overruled by the Judge, and defendant's counsel excepted thereto, and plaintiff's counsel read said certificate in evidence. The certificate showed the due presentment and protest of the note on the 28th of June, 1851, service of notice on Crum, and stated, "that notice of protest was duly served on Robert H. Boyd, by leaving the same with a man attending at his place of business, on the next morning (30th June)." The counsel for plaintiff here rested, and the defendant's counsel moved for a non-suit on the following grounds:—

1st. That the plaintiffs having received the note from Crum, a prior endorser, could not recover from the defendant, Boyd, who is a subsequent endorser.

2d. That if the plaintiffs could recover, they were bound to prove a consideration passing between them and said Crum, before they could recover against defendant Boyd, inasmuch as the receipt of the note by plaintiffs from the prior endorser was in itself notice that the defendant Boyd was not liable to the prior endorser.

3d. That there was no evidence that defendants had received due notice of the non-payment of said note, or that the payment thereof had been duly demanded.

The motion for non-suit was reserved for further consideration and argument at a general term.

John Crum, being called as a witness on the part of the defendants, testified that he transferred the note to the plaintiffs in February, 1851, who paid for it in cash, the amount of it less the legal discount for the time it had to run. That the plaintiffs knew at the time all the facts in relation to the consideration of the note. That they were at the time owing him about \$5,000, but when to become due was not stated.

Being cross-examined by plaintiffs, testified as follows:—
Since I parted with the note I have not had control of it; I

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received it from Davis and Evans ; I had got up a machine for making files ; Evans and Davis purchased from me two-thirds of that machine ; about two or three months after that bargain was concluded, Davis came to me and said he had taken in a partner, and wished to know if I would sell my one-third for \$7,500 ; I agreed to do so, and appointed a day for settlement ; they agreed to give \$5,000 in cash and balance in two notes, one for \$1,250 made by Davis, endorsed by Boyd, and the other for like amount made by Evans and endorsed by Levi Brown ; I conveyed to them the one-third and received \$5,000 cash and the two notes, one of which, that endorsed by Boyd, is the note now sued on ; I had not at that time a patent for said machine.

The defendants then proved that an agreement, dated Nov. 5th, 1851, was entered into between Crum of one part, and Davis and Evans of the other, which recited that Crum had obtained letters patent, dated July 1st, 1851, and had assigned the same to Davis and Evans pursuant to the original agreement between them, and by it they mortgaged to Crum the letters patent to secure the consideration of the sale and transfer to them. The mortgage was conditioned to be void, on payment, within six months from its date, of all moneys and notes then due, and on payment of all moneys not then due, as they should become due, agreed to be paid, and given, in satisfaction of their purchase. Crum testified that, at the date of the mortgage, he held "notes of Davis and Evans for \$4,500, and the note in suit. I can't say that all or any of them were due at date of mortgage. I did not tell Davis that I had control of note in suit. Boyd's name was on the note when I received it from Davis. It was for debt of Evans and Davis. Plaintiffs are still in my debt." * * * "I never had any authority to extend the time of payment of this note. I never extended the time of payment of this note."

The note is not mentioned, or referred to, in the mortgage by any terms which *describe* it.

Robert Davis testified that, "the note in suit was one of the notes referred to in said mortgage, as being past due, and is embraced by it."

The defendants having rested, the plaintiffs proved by Wm.

H. Tyler, that he was in the employ of John D. Campbell, the notary who protested the note, and that he "served the notice of protest of this note upon Robert H. Boyd, on the 30th of June last (1851), by putting the same under the door of his place of business, No. 38, Courtlandt street," and also stated the contents of the notice.

The evidence being closed, a verdict was ordered for the plaintiffs as already stated.

B. D. Silliman, for defendant, Boyd, on the motion for a new trial, made the following points.

I. Assuming that Boyd was an endorser, there was no proof, on the trial, of due demand and notice. 1. There was no proof of demand. The only testimony on the subject of demand was the certificate of the notary. That certificate was inadmissible, because the defendant Boyd had "annexed to his plea an affidavit denying the fact of having received notice." (2d Rev. Stat. (3d Ed.) p. 382. *Garvey v. Fowler*, 4 Sand. 665.) 2. If, under the circumstances, a notarial certificate had been admissible, the notary could only certify acts done by himself, or of which he had knowledge. He does not profess to have served the notice, and the testimony of plaintiff's witness, Tyler, shows that he did not, and that the service was not made in the manner stated in the certificate. The certificate, therefore, does not prove notice. (*Ketchum v. Barber*, 4 Hill's R., at p. 236.) 3. The witness, Tyler, shows what was the actual service. He shows that he (Tyler) served the notice, "by putting it under the door of Boyd's place of business." This was not sufficient without also showing that it was so served within usual business hours. If left, out of those hours, such service would not be sufficient, unless some person in the employment of defendant were found there to receive it. (Story on Prom. Notes, § 315 and note.)

II. Boyd must be regarded as second endorser. Crum, who was payee, and first endorser, had no right of action against Boyd on the note. Plaintiff received the note from Crum. The presumption of law therefore was, that Boyd was not liable—and plaintiff's receiving the note, with notice, could not

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derive from Crum any title as against Boyd, which they knew that Crum had not. (*Bishop v. Hayward*, 4 Term, 470. *Herrick v. Carman*, 10 J. R. 224, 12 J. B. 159. *Tillman v. Wheeler*, 17 J. R. 326. *Bradford v. Marten*, 3 Sand. 647. *Ellis v. Brown*, 6 Barb. S. O. R. 282.) In addition to this legal presumption, plaintiff had actual knowledge of the facts.—(Crum's testimony.)

III. Plaintiffs not having received the note in the usual course of business, and without notice, it is open to all equities. There was no consideration. Crum received the note for a patent which he professed to own, whereas he had no such patent—nor did he obtain such until July, 1851, a month after the maturity of the note.

IV. The plaintiffs owe Crum \$5,000. Their claim on this note has, therefore, been in effect satisfied. Under no circumstances can it be claimed that Boyd did more than promise to pay in case of Crum's default. Instead of Crum's being in default, he is the creditor of the plaintiffs.

V. The verdict should be set aside, and judgment be given for the defendants.

E. S. Van Winkle, for plaintiffs, made the following points.

I. Boyd was liable on the note as an endorser. (*Seabury v. Hungerfield*, 2 Hill. 80. *Hall v. Newcomb*, 3 Hill. 233.) And no particular form is requisite under the code, which requires merely a statement of the facts.

II. The plaintiffs, having taken the note in good faith, for value, before maturity, are entitled to recover against Boyd. (*Swift v. Tyson*, 16 Peters, 1. *Bailey on Bills*, 550. *Mecker-son v. Howard*, 19 John. 113. *Braman v. Hess*, 13 J. R. 52.)

III. The writing of the guarantee on the back of the note after maturity, and under the circumstances detailed, did not invalidate the note, the words having been again erased before the action was brought. (*Josselyn v. Ames*, 3 Mass. R. 274. *Nevins v. De Grand*, 15 Mass. R. 436. *Nevies v. Bird*, 11 Mass. 436. *Waring v. Smyth*, 2 Barb. Ch. 119.)

IV. The defendant, Boyd, not having denied receipt of notice of protest in his answer, the certificate of the notary was sufficient evidence of presentment and notice. (2 Revised St. 212 (2d Edition); Laws of 1833, Ch. 271, § 8.) At all events the evidence of Tyler is conclusive.

V. If defects in testimony on plaintiffs' part are supplied, even after a motion for non-suit, the court will not disturb the case. (*Jackson v. Leggett*, 7 Wend. 377. *Colvin v. Burnet*, 2 Hill. 620.)

VI. There must be judgment in favor of the plaintiffs for the amount of the verdict, interest and costs.

CAMPBELL, J.—Boyd was liable on the note as endorser. The cases cited by the defendant's counsel are those where the action is brought by the payee or first endorser, against a subsequent endorser, or when suit is confessedly for the benefit of payee or the endorser.

We do not think there is anything in this case tending to show that the plaintiffs are not *bona fide* holders for full value, and they appear to have relied on the endorsement of the defendant Boyd when they discounted the note.

The certificate of the notary we think was sufficient. Laws of 1833, § 8, chapter 271, make such certificate presumptive evidence of the facts contained in it, unless the defendant shall annex to his plea an affidavit denying the fact of having received notice. Here the defendant expressly admits in his answer that he received notice, but denies that he has sufficient knowledge or information to form a belief whether he received due notice. If we concede that the mere answer may stand in place of the affidavit required by the statute, we do not think it meets the requirements of the law. The answer does not deny, but expressly admits the receipt of notice. The certificate states that notice was duly served, and it was presumptive evidence of that fact.

It was not necessary in this view for the plaintiff to have called the witness Tyler.

The fact that the plaintiffs are indebted to Crum, the payee and first endorser, we do not think material. It nowhere appears how that indebtedness arose or whether the money is

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due. For aught that appears it may be a mortgage debt, not due.

BOSWORTH, J.—The plaintiffs are entitled to judgment on the verdict.

As to certain points there can be no controversy. Boyd endorsed the note at the request of Davis, that it might be delivered to Crum. It was so delivered: no fraud was practised by Crum on Davis, nor did he make any warranty which has been broken. Davis knew when he gave the note, that a patent had not then been obtained. One was subsequently obtained by Crum, and assigned by him to Davis and Evans, which assignment they accepted as performance by Crum of his promise to them. As between Davis and Crum the note was made on a good consideration; and Boyd, in the most favorable aspect of the case for him, was an endorser for the general accommodation of Davis, the maker: his endorsement has not been misapplied. The note was negotiated to the plaintiffs before maturity, for full value. They are therefore entitled to recover against Boyd, as endorser, if he has been properly charged as such.

The defendant Boyd, in his first point, erroneously states, as a ground for the inadmissibility of the notary's certificate to prove demand of payment, that Boyd had "annexed to his plea an affidavit denying the fact of having received notice."

The answer admits expressly "receiving notice of protest of such note," but alleges the want of sufficient knowledge "to form a belief whether or not he received due notice of said protest." The notary's certificate was therefore competent evidence of any facts contained, and by law authorized to be stated, in it. It shows due presentment of the note, demand of payment, failure to pay it, and protest of it, for non-payment.

Next, as to the service of notice of the protest on Boyd. Tyler testifies to serving a notice in proper form, and on the right day, by leaving it at Boyd's place of business. He served it by putting it under the door, and does not state whether it was served in the morning before the store was opened, or at evening after it was closed, nor whether the store was open or closed at the time of the service. Such evidence, standing

alone, would be unsatisfactory, and perhaps insufficient. But Boyd admits receipt of the notice, and does not deny that he received it on the day it was served. The testimony of Tyler and Boyd's admission, together furnish sufficient *prima facie* evidence of due service of notice of protest on Boyd: and that he received on the day on which it might, legally, have been served.

Whether Boyd, as between Crum and himself, is to be regarded as first or second endorser, is of no consequence in this suit. He is an endorser who has been regularly charged as such, and the plaintiffs are holders for value. One who endorses for the general accommodation of the maker, or payee of a note, is liable to a holder for a value, taking it before maturity, though the holder knew when the note was transferred to him that the endorsement was an accommodation one.

The fact that the plaintiffs were indebted to Crum at the time they bought the note in the sum of \$5,000, and that they were indebted to him when this action was tried, is neither a legal nor an equitable defence to Boyd. It does not appear that such indebtedness was due when this action was commenced, so that it could have been set off by Crum, if he had been sued. And no such defence is set up in Boyd's answer. The nearest approach to such a defence is found in the allegations that the note was never negotiated to the plaintiffs, that they paid Crum no consideration for it, that Crum delivered it to them, to be collected by them for him as his agents. These allegations are disproved by uncontradicted testimony, given by a witness called by Boyd.

If, as between Boyd and Crum, the former is to be treated as last endorser, and therefore entitled, on paying the note, to maintain an action against Crum, there is no allegation of his being unable to pay it, or of there being the slightest risk of Boyd's ability to collect it from him.

All questions as to the effect of writing the guaranty on the note, over the name of Boyd, having been expressly waived by him on the argument, it is unnecessary to consider them. The motion by Boyd, for a new trial, should be denied.

EMMER, J., concurred. Motion for a new trial denied. Judgment for plaintiff, with costs.

Rising v. Dodge.

WILLIAM C. RISING v. NEHEMIAH DODGE.

No action can be maintained by a father to recover damages for the removal of his infant child so as to prevent the production of the body of the child upon a habeas corpus, when it appears the father had not an absolute right to the custody of the child, and that the child was incapable of rendering any services of value.

If the conduct of the defendant, in the removal of the child, amounted to a violation of the provisions of the R. Stat. (2 R. S., p. 572) he is liable to be prosecuted for a misdemeanor, but is not liable to a civil action unless special damage is shown. No such action is given by the statute.

Upon these grounds judgment for the defendants.

(Before Duer and Bosworth, J.J.)

February 16; February 26, 1853.*

THIS action was brought by the plaintiff, as father of Wm. C. Rising, Jr., a minor, between 7 and 8 years of age, to recover of the defendant damages alleged to have been sustained, being the costs and expenses of proceedings by *Habeas Corpus* to obtain possession of the child, and also the value of the services of the child, whom, as the complaint alleged, the defendant removed from the state to prevent his being brought up on the *Habeas Corpus*, and delivered to his father, the plaintiff.

The plaintiff married a daughter of defendant. About three years before this action was commenced the plaintiff and his wife separated. She continued, with her two children, from that time to live in the city of New York, with her father, the defendant. The plaintiff went south, and was residing in Charleston, S. C., when this action was brought. He came to this state, and demanded of defendant the boy. The boy's mother being then in Connecticut, the defendant sent the boy to her. The plaintiff procured a *Habeas Corpus* to be served on the defendant, requiring him to produce the body of the boy. The defendant made return that the boy was not in his custody, nor under his control, and the writ was dismissed. The plaintiff then brought this action to recover moneys fruitlessly expended in and about prosecuting the writ of *Habeas*

* Vide *The People v. Ross Parker*, 1 Duer 709.

Corpus, alleging that the defendant, with intent to elude the service of said writ, and to avoid the effect thereof, transferred the custody of the child, and removed him out of the state. Plaintiff also sought to recover for loss of the service of his child.

Mr. Justice Campbell, before whom the action was tried, "decided that the plaintiff could not recover under that part of his complaint which related to a deprivation of the *Habeas Corpus* and his expenses thereon, but only on that part relating to the abduction of the child and the loss of services; to which decision the plaintiff's counsel excepted. The defendant excepted to any action upon the complaint after the judge had decided that the statute gave no cause of action on the *Habeas Corpus*, unless the complaint was amended, which exception was noted.

"The defendant called as a witness,

"*Lucy Leadbeater*, who being duly sworn, says: I am the daughter of the defendant; plaintiff is my brother-in-law; the plaintiff and his wife separated about three years since, and she, with her children, has lived with my father since, and the plaintiff and his wife since the separation have had no intercourse together.

"The judge charged the jury that the plaintiff could not recover for any expenses incurred by him in obtaining a *Habeas Corpus*, &c., that if the defendant did not obey the writ as claimed the statute gave a remedy by indictment, and that the plaintiff could not recover in this action damages from the defendant for such disobeying, even if proved guilty.

"To which portion of the charge the counsel for the plaintiff excepted. The judge further charged, that if the plaintiff was entitled to recover at all, it would be only for the services of the child. And that it appeared that up to the time of the demand made, the child and its mother had lived at the defendant's house, the child being in the custody of its mother; and that the defendant, on the demand being made of him, had at once placed it again in the mother's custody, from whom he had received it; the plaintiff had not proved the value of any services, nor shown that the child was capable of rendering any services of value; still, if the child was capable of rendering any services, the plaintiff may be entitled to recover for such

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services intermediate the demand and the restitution of the child to its mother. The judge declined giving any further instructions to the jury as to whether they should find only nominal damages, or whether they might find exemplary damages. To all which the counsel for the plaintiff excepted. And the jury found a verdict for the defendant; and in pursuance of provisions of § 265 of the code, the judge ordered this case to be first heard at a general term."

Mr. A. Dyett, for plaintiff, insisted—

I. The judge erred in deciding at the trial, and charging the jury subsequently, that the plaintiff could not recover damages for the wrongful acts of the defendant, whereby he had been deprived of the benefit of the *Habeas Corpus* issued for the purpose of getting the custody of his child, nor for his expenses thereon, and in searching for the child. 1. The plaintiff, the father of the child, by the law of nature and of man, is the legal custodian, and has a paramount right to the custody of his child. (1 Black Com. 478-9; id. 408, 418, 420, 422, 424, 425.) 2. The mother's right is only that of affection and duty from the child; and is subordinate to that of the father. (1 Black Com. 453, 478-9, 408, 418; *Barry v. Mercein*, 3d Hill, 407; *People v. Pillow*, 1 Sandf. R. 672.) 3. The father had no right to delegate his right or his child's custody to another; and if he had, the instant he demanded that custody he revoked that authority, and had, *eo instanti*, an absolute right to the custody of the child against all the world. (*Barry v. Mercein*, supra, 5th East, 221; 10 Vesey, jun., 58-9.) 4. The mother, if ever she have the right to the custody, cannot delegate that right to another, semble *People v. Mercein*, 3d Hill, 410, 411; much less can a right received from the wife be set up in hostility to the father's right by a stranger. 5. It was therefore the duty of the defendant, on demand, to deliver the child to the father, (a subsequent delivery to the mother is no excuse); and the refusal to do so subjects him to a special action for all the consequences thereof. 6. The defendant having parted with the custody of the child, and taken the child to Connecticut, as alleged, the act was wrongful at common

law; and the defendant having by that wrongful act deprived the plaintiff of a legal right, to wit, the right to the writ of *Habeas Corpus*, is answerable for the expenses of the *Habeas Corpus*, and the expenses of endeavoring to regain its custody, which are claimed as special damages in the complaint. 7. Although a man is not always liable to another for the consequences of his acts, it is only so when the act producing the injury was not wrongful *per se*, but it was the exercise of a right by the defendant; in such case only is it *damnum absque injuria*. (*Radcliffe Ex. v. Mayor, &c.*, 4 Comstock, 200.) Nor is it necessary that malice should exist; it is sufficient if there be a wrong and an injury. (*Foster v. Charles*, 4th M. & P. 615, 741; 6 Bing. 396; 7 Bing. 105; *Pasley v. Freeman*, 3 T. R. 51; Comyn's Dig., "Action upon the Case," A., p. 278; Rol. 109, 1, 15.) 8. The action is not brought upon the statute, the act of the defendant was a wrong, even if the statute had not made it an offence, and even if it were not a wrong without the statute; the rule that an offence, *malum prohibitum*, is confined in its punishment to the statute creating it, does not forbid an action for the consequences of the illegal act, where actual damage is proved; it only forbids an action for damages in cases where a penalty is given *eo nomine* by the statute to the party aggrieved, in which cases the penalty alone can be recovered. (See cases cited under 7th and 9th subd., *Sadmore v. Smith*, 13 John. R. 322, and cases there cited show this to be the rule. 1 Kent Comm., 7th ed., 517, *et in notis*; 2 R. S. 562, § 76; *Cook v. Dorby*, 4 Munf. 444.) The act of the defendant was pleaded according to the wording of the statute, only to show that in addition to the wrong itself at common law, it was also made an offence by statute. Enough is stated in the complaint without the statute; it is alleged that he took, &c., the child out of the state, &c., which is entirely *dehors* the statute. (Even at common law it is a misdemeanor to take a child from its father's possession; *Andrews*, 312.) We had a perfect right of action, had the statute never been passed. (*Sedgwick on Damages*, 20 to 34; *Chamberlaine v. Chester R. Co.*, 1 Exch. K. 870; *Kaine's Prin. Eq.* 181-2, 6 Hill, 466; *Hallet v. Novion*, 4 Johns R. 290.) 10. The expenses of the *Habeas Corpus*, and other expenses searching for

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the child, were recoverable as special damages, consequent upon the abduction of the plaintiff's child, in addition to the loss of his services and companionship, and the matter in the complaint on this latter subject was necessarily set out to show this special damage. (*Wert v. Jenkins*, 14 Johns. R. 352; *Ford v. Monroe*, 20 Wend. 210; *Whitney v. Hitchcock*, 4 Denio, 63; *Cowden v. Wright*, 24 Wend. 429.) In the two last cases no special damages were proved, and the act was a trespass for which the child could recover, which is not the case here.

II. The judge erred in all that part of the charge after the word "guilty." The charge was calculated to deprive the jury of any guide whatever in assessing the damages. 1. No proof was necessary of any acts of service, or the child's capacity, nor their value. The slightest acts of service were sufficient, of which the child could legally be presumed to be capable; the law does not measure the value of cheerful services, which are prompted by affection, in the same scale as those which are sullenly doled out; proportioned to the expected compensation; as examples of this, are the familiar cases of seduction and criminal conversation, in the latter of which the loss of the *consortium* alone is sufficient; and we expressly aver we lost the "society" of the child. The principle is the same in all the cases; the act of the defendant was a wilful violation of the plaintiff's rights, and justly entitled the plaintiff to exemplary damages. (21 Wend. 79. 4 Comstock, 75. Sedgwick on Damages, 20 to 34, 38, 47, 65, 79, 81; cases in note to p. 90; 453 to 467, 563, *et seq.* *Bennett v. Lockwood*, 20 Wend. 223. *Martinez v. Grueber*, 3 Scott N. R. 386.) 2. As before shown, the delivery to the mother was no excuse, and plaintiff was entitled to damages up to the time of trial, if not till the child's majority. See cases, *supra*.

III. It is no objection to this case that it is one of the first impression; if it can be sustained on well established principles, it is sufficient. (*Ashby v. White*, 1 Bro. Cases Parl. 62. *Aldridge v. Stuyvesant*, 1 Hall R., p. 215. *Dyett v. Pendleton*, 8 Cow. 277. *Chapman v. Peckergill*, 2 Wills. 146. *Winsmore v. Greenough*, Willes. 577. *Pasley v. Freeman*, 3 T. R. 51. *Southwood v. Van Pelt*, 3 Barb. S. C. R. 347.

Drew v. Coulton, 1 East, 563 a. *Milward v. Sargent*, 1 East 577 n.)

IV. The verdict was against evidence, and wrong in any event; the plaintiff was entitled to nominal damages at any rate.

A. J. Vanderpoel, for defendant, made and argued the following points.

I. The court was correct in rejecting the demands connected with the *Habeas Corpus*. 1. The statute [2 R. S. 572, orig. paging, § 76] gave a remedy by indictment, and there was no action at common law for eluding a writ of habeas corpus, although one for false return exists. 2. § 76 controls (if any), because writ was served 10th Sept., while child left respondent 9th Sept. 3. Where no remedy existed at common law, the statute remedy is alone to be pursued. (Dwarris on Statutes, 678, 679. *Almy v. Harris*, 5 John. 175. *Stafford v. Ingersoll*, 3 Hill. 38.) 4. Whenever an action has been allowed, concurrent with the pursuit of the statute remedy, it was permitted upon the principle that the statute gave an incomplete remedy. But in this case, the portion of the action allowed by the court *per quod amisit servitium*, was complete in its remedy.

II. Assuming that there exists an accumulative remedy upon the *Habeas Corpus*, the writ was void. Application for the writ was made to a justice of the Common Pleas of this county, when prisoner was detained, if at all, in Newtown, Queens Co.; and this fact appellant knew before applying for the writ. The officer to whom application is made must have jurisdiction of a prisoner in his county excepting, &c., &c. (see 2 R. S. 564, orig. paging; Notes on Hab. Corp., 4 Hill. 652), and appellant's writ was not within the statute exception.

III. The court left to the jury to say whether the child was capable of rendering services, and if so, their value. The jury found the child was incapable of rendering services.

IV. The charge that loss of service was the gist of the action, and that the services must be proven, is sustained by the reason of the law and the cases. (Reeves' Domestic Relations, 291; 2 Kent, 195. Leading case of *Hall v. Hollander*, 4 B. & C. 660. *Weedon v. Timbrel*, 5 T. R. 357.)

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BOSWORTH, J.—The jury found that the child was incapable of rendering service: So far as the right to maintain the action depends upon proof of special damage resulting from the loss of service of the child, the existence of the right is disproved by the verdict of the jury.

The father has no property in the child, and no action has accrued from an unauthorized removal of his property.

Prima facie he has a right to the legal custody of the child, and where no special reasons are shown to induce a court to act otherwise, it will award to him the custody and require the child to be restored to him. (18 Wend. 637. id. 17. 3d Hill 405.) But the court will not under all circumstances interfere, and take a child, though under fourteen years of age, from the possession of a third person, and deliver it over to the father against the will of the child. If the infant is competent to declare an election, the officer before whom it is brought on *Habeas Corpus*, will allow it to go with that one of the parents with whom it prefers to reside. If the infant be too young to form a judgment, the court, in some cases, will exercise its judgment for the infant, so far at least as to refuse to make an order that it be delivered to the party seeking to obtain a change of custody. (2 Kent's Com. 194; 4 J. Ch. R. 80.)

The Revised Statutes provide that when any husband and wife shall live in a state of separation without being divorced, and shall have any minor child of the marriage, the wife, if an inhabitant of this state, may apply to the Supreme Court for a *Habeas Corpus*, to have such minor child brought before it, and on the return of the writ, and on due consideration, may award the charge and custody of the child to the mother for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require. (2 R. S. 194, § 1, 2.)

An officer before whom such a child should be brought on *Habeas Corpus*, might properly refuse to make an order requiring the mother to deliver it to the father, on a state of facts being shown which might induce the Supreme Court to take it from the father and award it to the charge and custody of the mother.

In this case the husband and wife had been living separate and undivorced for over three years prior to the issuing of the *Habeas Corpus*. His wife and her two children went to reside with her father, the defendant. The plaintiff went to South Carolina and continued to reside there. For aught that appears in the case, the support and maintenance of herself and children had been devolved upon the defendant and borne by him. The wife and children remained in this state. The defendant left it and remained out of it.

For aught that affirmatively appears, the father was a fit person to have charge of the child. And for aught that appears the mother was equally fitted for the trust, and had discharged its duties, with a wise regard to her son's present and future happiness. Is it clear that on these facts, the child would have been taken from the mother and delivered to the father? Is there not some evidence of abandonment, not in the offensive sense of the term, but practically, of all care over and provision for him?

If the judge issuing the *Habeas Corpus*, might in the proper exercise of his discretion have refused to interfere, the plaintiff failed to show any strict right to the actual custody, which has been interfered with by the defendant.

The defendant was not bound to bring the child to the city on the demand of the plaintiff, nor to retain it in his custody. The most that could be required of him, under any circumstances, was non-interference. He made no claim to the custody, he merely permitted the child to be at his house.

The only act of which complaint can be made, is his taking of the child to Connecticut and leaving it with the child's mother, with whom the plaintiff left it on quitting the state.

If such an act falls within the prohibition contained in either the 61st or 62nd section of 2 R. S. 572, it is enough to say, that the statute which creates the offence, prescribes the punishment. No civil action lies to recover the expenses incurred in issuing and attempting to execute the *Habeas Corpus*, where no special damage is shown to have resulted from the removal.

And as the jury found the child was incapable of rendering
D.—II

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any service, the new trial should not be granted, in this particular case, for the reason that the facts appearing on the trial present a case, on which the judge issuing the *Habeas Corpus*, might properly have refused to interfere, and change the custody of the child. The motion for a new trial must be denied, and a judgment entered for the defendant.

HARRISON v. WOOD.

Judgment for the defendant upon a dismissal of the complaint, in an action at law, is no bar to a subsequent action by the plaintiff for the same cause.

(Before DUBB, CAMPBELL, and BOSWORTH, J.J.)

February, 18; February, 26.

APPEAL from a judgment at special term in favor of the plaintiff.

The action was to recover damages for an assault and battery, and was tried before the Chief Justice and a jury in October, 1852.

The answer, after denying the assault and battery, set up as a defence, that the plaintiff in May, 1850, had commenced an action in the Supreme Court for the identical cause of action set forth in the complaint; that an issue of fact was joined thereon, and the same was brought to trial, and a judgment rendered against the plaintiff in favor of the defendant. The record of this judgment was produced upon the trial, and it appearing that the judgment was for the dismissal of the complaint by default, the Chief Justice overruled the defence. Upon the testimony the jury found a verdict in favor of the plaintiff for \$240. The counsel for the defendant having excepted to the ruling of the Chief Justice, the only question now was whether the exception was well taken.

E. Sandford, for the defendant, insisted that—

The judgment for the defendant in the Supreme Court barred

a subsequent action between the same parties for the same cause of action.

The plaintiff had an opportunity to litigate his difficulty with the defendant in a tribunal of his own selection, and the judgment of that tribunal should be, and is, final and conclusive upon all matters that could have been litigated in that action. If the plaintiff chose another court in which to try his cause of action, he should have voluntarily withdrawn his action in the Supreme Court, and not suffered the judgment of the court to be rendered against him.

The counsel cited *Le Guen v. Gouverneur*, 1 John Ca. 492. *Ogbury v. Lafarge*, 2 Comst. 113. *Brown v. Embury*, 3 Comst. 511.

J. Edgar, for the plaintiff, contended that—

I. The disposal of the former suit was not such as to determine the rights of the parties. 1. The dismissal of the complaint in that suit was by an order upon motion, which did not operate as a verdict and judgment to conclude the rights of the parties. (3 Code Reporter, 241 and 37. 5 Pr. Rep., p. 30.) 2. The judgment in the first case must be viewed in the same light with a judgment as in case of nonsuit. (6 Pr. Rep., p. 218.) 3. The determination of the first action was equivalent to a nonsuit; and the costs, in that case, were paid before a second action was commenced.

II. To bar a recovery in a second action for the same cause, it must appear not only that the same questions were in issue in a former suit, but also that they were distinctly considered and passed upon in such suit. (*Wood v. Jackson*, 8 Wendell, p. 35. *Lawrence v. Hunt*, 10 Id. 84. *Young v. Rummell*, 2 Hill. 481. *McKnight v. Dunlop*, 4 Bar. Su. Rep. 36. *Quackenbush v. Ehle*, 5 Id. 469.)

III. There is no evidence that the facts of the case had ever previously been passed upon, or in question before a court or jury.

IV. The judgment should be affirmed, with costs.

By THE COURT.—The dismissal of a complaint under the

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Code, in an action at law, we are clearly of opinion has no other effect than that of a nonsuit under the former practice. There is a change of name, and nothing more. The Chief Justice was therefore correct in holding that the judgment in the former action which was relied on as a defence, was no bar to the plaintiff's recovery.

Whether an absolute bar may not be created by the dismissal of the complaint, when no other than equitable relief is sought, and the cause has been heard at special term, is a different question, upon which we are not to be understood as intimating any opinion.

The judgment must be affirmed, with costs.

WILLIAMS v. STORM impleaded with AUSTIN and others.

Notes, having no previous inception, if discounted at more than 7 per cent. per annum, are void for usury. The accommodation endorsers of such paper are not liable, although the last endorser may have endorsed it, on the understanding that the proceeds should be used to take up acceptances which he had made for the makers, and which it was the duty of the latter to pay.

(Before DUFF, CAMPBELL, and EMMET, J.J.)

February 18 ; February 26.

THE action was brought to recover against the defendant, Storm, as first endorser, the amount of five promissory notes, made by a corporation named the Empire Mills, dated December 10th, 1850, payable to the defendant or order six months after date, and amounting in the aggregate to \$10,000. The second endorsers, the other defendants, were the persons composing the mercantile firm of Austins & Spicer, and had suffered judgment to be taken against them by default.

The defence set up by Storm, in his answer, was, that the notes were endorsed both by himself, and Austins & Spicer, at the request of and for the accommodation of the makers, the Empire Mills, and when so endorsed were owned and possessed by and had not been put in circulation by the makers ; that when the notes so endorsed were first put in circulation, they

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were negotiated and delivered by the Empire Mills to the mercantile firm of Wright & Titus, who discounted the same at the rate of more than seven, and at the rate of 12 per cent. per annum. The answer therefore insisted that the notes and the endorsements thereon were usurious and void in their inception. The reply took issue upon the matters set forth in the defence.

The issues were brought to a trial before Mr. Justice SANDFORD and a jury, on the 24th of May, 1852, when

Edwin C. Hamilton, a witness for the defendant, Isaac T. Storm, testified as follows: In 1850 I transacted business in the city of New York, and was the Treasurer of the Empire Mills, which was a manufacturing corporation, located in the county of Oneida, in this State. The five notes in question in this action were made by the said Empire Mills. I filled up and signed them as such Treasurer. I called upon the defendant, Storm, and he endorsed the said five notes at my request, for and on account of the Empire Mills, and for their accommodation; the notes remaining in my hands for the use of the corporation; I knew the firm of Austins & Spicer; that firm transacted an auction and commission business in the city of New York, in and prior to 1850, and consisted of the other defendants in this action; I called upon the said Austins & Spicer, and they also endorsed the said five notes with their said firm name, at my request, for and on account of the said Empire Mills, and for their accommodation; the notes remaining in my hands for the use of the corporation. Both of said endorsements were made in the city of New York, and the agreement both with Mr. Storm and with Austins & Spicer was, that if the said notes were used or put in circulation, the said Empire Mills should provide for and pay them at maturity.

I then negotiated with Messrs. Wright & Titus, of Wall street, that they should buy from me a lot of negotiable promissory notes, amounting in the whole to fifty or seventy-five thousand dollars; I do not just now remember which sum—at a rate agreed upon; they agreed to take the paper, deducting from the whole amount of the said paper interest, or discount, at the rate of 12 per cent. per annum, for the time

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the paper had to run before maturity, and also a quarter of one per cent. upon the whole amount, by way of a brokerage fee on the transaction, as if they had sold the paper for account of the Empire Mills; they took the paper in that way: I handed them the paper, amounting to fifty or seventy-five thousand dollars; they paid me about two-thirds of the money down, and within four or five days after, rendered me an account according to the agreement, deducting discount at the rate of twelve per cent. per annum on the amount for the time the paper had to run, and the quarter per cent. brokerage, and paid me the balance. The five notes in question were part of this lot of paper so disposed of to Wright & Titus; all the said paper was of the said character; it was all accommodation paper; this transaction was for and on account of the Empire Mills, and I applied to their use the money so received from Wright & Titus; this transaction with Wright & Titus took place early in December, 1850, soon after the date of the said five notes.

On cross-examination, this witness testified as follows:—These five notes were procured by me on behalf of the Empire Mills; my duties as treasurer of the Empire Mills were defined by the by-laws; in procuring the endorsements, I negotiated with the parties personally; I also conducted the negotiations with Wright & Titus personally; in purchasing the paper, Wright & Titus did not state that they purchased for any other person.

The witness, in answer to an enquiry of the court, why the notes in question were said on their face to be on account of wool, testified that, about twelve months previously, a large amount of wool had been consigned by the Empire Mills to Austins & Spicer, for which they had accepted; these notes were on that account; it was stated to Wright & Titus, at the time of the negotiation, that these notes were made to reimburse Austins & Spicer.

The counsel for the defendant, Isaak T. Storms, further pursued the direct examination of this witness, and he testified as follows: The Empire Mills originally consigned to Austins & Spicer, for sale on their account, on commission, a large quantity of wool, amounting in value to \$750,000; the Empire

Mills drew upon Austins & Spicer, who accepted their drafts for their accommodation, based upon and in anticipation of the proceeds of the sale of said wool; I received those accepted drafts, and negotiated them for the Empire Mills; in the course of about six months, Austins & Spicer had sold about two-thirds of the wool; they were then ordered to sell no more; they were ordered to charge the balance in account, as if upon a sale to the Empire Mills, and three other mills connected with them; Austins & Spicer, however, to keep the wool until required by the Mills for manufacturing purposes, and we, the Empire Mills, undertook to keep them in funds, so as to prevent their being obliged to pay out cash upon their outstanding acceptances; the wool never belonged to Austins & Spicer; Austins & Spicer rendered the account of this assumed sale of the wool and agreed to give us, the Empire Mills, their name in any way we required, as endorsers or acceptors, we to keep them in funds, so that they should not be in advance for cash paid out; in pursuance of that arrangement, the Empire Mills took the wool out of the hands of Austins & Spicer, from time to time, as needed, during a period of about six months; also, as their paper matured, we took their name upon fresh paper, negotiated it in the market, and paid over the proceeds to them, as agreed, in time to keep them from being in advance; we paid Austins & Spicer a commission of two and a half per cent. on the amount of all paper on which they so put their name; the paper varied in the length of time it had to run—from four to six months; in this way, the balance of the original acceptances, beyond what was realized by Austins & Spicer from the actual sale of the wool, was renewed several times; all the renewals prior to the transaction with Wright & Titus, were effected by paper, on which Austins & Spicer were acceptors, and the persons primarily liable and the proper persons to have the money to take up the paper when it fell due; this was the only instance in which notes were made; this transaction with Wright & Titus was about ten days before the acceptances of Austins & Spicer, then outstanding, became due; the object was to obtain money to take up those acceptances about to mature—it was another renewal of that transaction, and was in no way connected with any other; most of

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the original set of acceptances were given by Austins & Spicer before the wool actually came to their hands.

The testimony was here closed, and the judge directed the jury to find a verdict for the plaintiff for the whole amount claimed, subject to the opinion of the court on a case to be made and heard at a General Term in the first instance, and judgment to be entered for the plaintiff, or the defendant Storm, accordingly—with leave to either party to except and make a bill of exceptions accordingly, after the decision of the court.

The jury found for the plaintiff. Damages, \$10,663.

T. Tucker, for the plaintiff, now moved for judgment upon the verdict, and insisted that the notes in question were drawn for good consideration under a valid and existing agreement, and were not in any sense accommodation paper. (*Mottram v. Mills*, 2 Sandf. S. C. 189; *White & Sheffield v. Springfield Bank*, 3 Sandf. 222.) And if considered accommodation paper they were used for the purpose for which they were designed, and the plaintiff paid value for them. The defendant cannot, therefore, inquire into the amount of consideration. (*Montross v. Clark*, 2 Sandford S. C. 118; *Brown v. Mott*, 7 Johns. R. 361; *Wardell v. Howell*, 9 Wend. 170.)

C. O'Conor, contra, argued that the notes were first put in circulation as operative instruments, when purchased or discounted by Wright & Titus, and that as such purchase or discount was at a rate exceeding 7 per ct. per an., they were, under the statute, clearly void (1 R. S., p. 773-5). He therefore claimed that the verdict should be set aside, and a verdict and judgment thereon be entered for the defendant.

By the Court.—It is plain that the notes were endorsed by Austins & Spicer, and also by Isaac T. Storm, the defendant, for the accommodation of the Empire Mills. The notes were never owned by, nor in the possession of either of the endorsers. They continued in the possession, and to be the property of the makers, until they were negotiated to Wright & Titus, at a discount, greater than at the rate of seven per cent. per annum. The discount, at such rates, of notes having no previous legal

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inception, or validity, renders them usurious and void. (*Aely v. Rapelye et al.*, 1 Hill, 9.) The fact that Austins & Spicer endorsed the notes, to enable the Empire Mills to raise money upon them, to take up acceptances by the former, which it was the duty of the latter to pay, does not alter the character of the notes in suit, nor can it have the effect to render them valid and recoverable against the first endorser, until after they have been negotiated to some one, for value, in some business transaction, not prohibited by the statute, in relation to usury. The verdict must be set aside, and judgment entered in favor of the defendant, Storm.

BERNARD MCGOWAN and others v. ANN MCGOWAN and others.

R. McGowan, by his last will devised all his estate to his wife, "for her own behoof, and the maintenance of his children, and upon his son John (the youngest child) becoming of age, the whole estate to be equally divided among his seven children (naming them), and that should death take either from the world, it should be equally divided among the survivors."

Held, That the devise created no trust suspending the power of alienation, and that, at any rate, the suspense, if any was created, could not exceed a single life in being at the death of the testator.

Judgment at special term affirmed with costs.

(Before DUEK and CAMPBELL, J.J.)

February 21; February 26, 1858.

APPEAL from a judgment at special term, sustaining a demurrer to the complaint.

The suit was for the partition of certain real estate in the city of New York, which had belonged to Bartholomew McGowan, deceased. The plaintiffs were two of the children of the deceased, who claimed to be entitled, as heirs at law, to two sevenths of the estate. The defendants were the widow

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and the remaining five children of the deceased. The complaint admitted that the deceased had made a will, duly executed and published, devising all his real estate, but insisted that the devise was absolutely void, as repugnant to the provisions of the Rev. Stat., respecting the creation of estates in land. The devise, which was set forth in the complaint, and upon the validity of which the case turned, was in these words: "Second. I give and bequeath to my wife Ann all my real and personal estate whatsoever; the real estate consisting of house and lot 38 Centre street, and houses and lot 17 Roosevelt street: the personal estate in the house now occupied by me, 17 Roosevelt street, for her own behoof and the maintenance of my children, her to keep economically as possible, after paying my just debts, to rear and educate my children, and give them trades, whereby they may help her; and at my son John becoming of age, the whole of my estate to be divided equally among my children, named Bernard, Alice, Bartholomew, Martin, Matthew, Mary, and John, seven in all; but should death take either from the world, it shall be equally among the survivors."

The defendants demurred to the complaint, upon the ground that it appeared upon its face that the plaintiff had no right to claim a partition, and judgment upon the demurrer was rendered at special term in their favor.

M. Hoffman, for the plaintiffs, insisted that the devise suspended the power of alienation for a greater period than two lives in being at the death of the testator: and also created a suspense for an absolute term of years, namely, the possible duration of John's minority. It was therefore absolutely void, and the estate descended to the testator's heirs at law. (He cited 2 R. S., 3 id., p. 10 and 15; 16 Wend. 61; 1 Sand. Oh. R. 359; 4 id., pp. 414, 515, 528.)

C. Schaffer, contra.

BY THE COURT. DUEB, J.—The widow in this case took the whole estate subject to the maintenance and education of the children, as a charge, which a court of equity might enforce

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(2 Hare, 607. 10 Simons, 293. 8 L. and Eq. R., p. 53), but which created no trust under the provisions of the R. S. She was not bound to apply the whole rents and profits to the use of the children, and hence the case is not covered by sub. 3, § 55 in the title of uses and trusts (1 R. S., p. 328), and it is only an express trust created under this subdivision, which suspends at all the power of alienation. Under the provisions of this will there is no suspense except such as may be occasioned by the minority of the children—there is none which is caused by any limitation or condition in the will (1 R. S. § 15, p. 23).

Even could we hold that the will creates an express trust suspending the power of alienation, the suspense is limited to a single minority, and is therefore valid. According to the settled construction of such a limitation, the suspense would terminate on the death of John the youngest child, and is therefore confined to a single life in being. We see nothing in the provisions of the will that should lead us to depart from the general rule. On the contrary, we believe that a single minority was selected for the very purpose of meeting and avoiding the objection that has been relied on. Should John die during his minority, the fee would vest immediately in the surviving children, and in the fee, the charge for their education and maintenance would necessarily be merged. The estate of the widow and the trust attached to it would then cease.

The principles of our decision in *Lang v. Ropke* (5 Sand. 368), will be found on examination to embrace this case.

The judgment at Special Term is affirmed with costs.

JAMES MOORE, Appellant, v. J. J. V. WESTERVELT, Sheriff
and Respondent.

The omission of a party on whose behalf a sheriff is acting to interfere with him in the discharge of his duties, or to complain of the manner in which they are performed, is no evidence of his assent to the sheriff's neglect or violation of duty.

Hence where such omission is the only proof of the assent of the party that is

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relied on, the question whether the assent was given ought not to be submitted to the jury.

A vessel in the custody of the sheriff was lying near one of the wharves of the city, when there were strong indications of an approaching storm, but he took no measures himself nor instructed any one to take any measures on his behalf, for the safety of the vessel, and during the night a storm arose in which she sunk.

Held—that the question whether reasonable care and diligence had been used by the sheriff to guard the vessel against the consequences of the storm ought not to have been submitted to the jury, but a positive instruction ought to have been given that he had been guilty of negligence, which rendered him liable. Upon these grounds new trial ordered. Costs to abide event.

(Before CAMPBELL, BOSWORTH, and EMMET, J.J.)

December 10, 1852; March 26, 1853.

THIS was an action to charge the defendant for neglect of duty as sheriff of the city and county of New York. The plaintiffs in September, 1848, before this action was brought, commenced an action in this court against Lewis Hoffmann, then master of the schooner "Calcutta," lying in the port of New York, to recover the possession of 161 tons of coal, then on board of said schooner, and by the bill of lading under which it had been shipped from Philadelphia to New York, consigned to the plaintiff.

The sureties in that action having been excepted to, the defendant having, as sheriff, the papers by which it was commenced, to execute, instead of immediately removing the coal from the vessel and putting it in a secure place, left it on board, during the period allowed by law for the sureties to justify. The schooner was heavily laden and leaky, and a storm arising, was sunk, and the coal damaged. The plaintiff having recovered in that action, brings this, to recover the damages alleged to have been sustained by the sheriff's neglect to remove and put the coal in a secure place.

The complaint charges, that on the 28th of September, 1848, being the owner of a cargo of coal, on board schooner Calcutta, Hoffman master, the plaintiff commenced a suit against Hoffman, and made a claim in due form of law, to have the property delivered to him.

That the defendant received the papers, approved the undertaking on the part of the plaintiff, served the papers on Hoffman, found the coal on board the vessel, and assumed to seize

it; but instead of taking it from the heavy laden vessel, he put a man in charge of the coal, and left it on board till the sureties should justify.

That this was wrongful on the part of the sheriff, and that he ought to have taken the coal from the vessel, and put it in a secure place.

That before the sureties justified, bad weather came on, and the vessel sunk with the coal.

That the sureties justified in due time, and the coal was demanded of the sheriff by the plaintiff, &c., but he declined to deliver it.

The defendant admits in his answer the receipt of the papers, &c., and substantially all the above facts, except the allegation that it was his duty to take the coal from the vessel, and put it in any more secure place, and insists the coal was safe against ordinary perils, but sunk by means of a severe gale.

He also sets up, that after the suit was commenced, he delivered the coal to the plaintiff, and offered to pay the costs of the suit.

The plaintiff replies that the coal was not safe where it was, and that it did not sink by the act of God, but by the defendant's neglect of duty.

He also denies the alleged delivery after suit, and says it was after he had been at the expense of getting up the coal, that the pretended delivery was made.

He states the damages sustained by him in being put to expense in getting up the coal, &c.

On the trial there was evidence tending to prove, that when the deputy went with Mr. Moore to serve the order of delivery, Hoffman, the defendant in that action, offered to surrender the coal at once, and Moore said he wanted it, but that the deputy told him the coal was in his possession, and he must keep it till the sureties justified.

That no further communication took place between Moore and the sheriff, or his keepers; that the keeper was not directed to see to the safety of the coal, but a watch was pretended to be set against the removal of the vessel.

That the keeper was informed of the approaching storm, and refused to allow the captain to remove her. That she was in

an exposed position, and would have been safe on the other side of the pier.

That on the third night after the seizure, the storm increased. That no keeper of the sheriff was there. The plaintiff justified his sureties and demanded the property, which was not delivered.

The plaintiff objected to any evidence to show the assent of Moore to the coal remaining on board of the vessel, on the ground that such defence was not set up in the answer. The court overruled the objection, admitted the evidence, and the plaintiff excepted.

The plaintiff also objected to evidence that Moore said he never meant to have brought the suit. The court overruled the objection, and the plaintiff excepted.

The plaintiff requested the court to charge several propositions which he declined, and the plaintiff excepted as to each, separately.

The jury found a verdict for the defendant.

The plaintiff appeals from the judgment entered on the verdict. The questions presented, are questions of law arising on exceptions to the charge, and to refusals to charge, as the plaintiff requested. The parts of the charge made, and the refusals to charge as the plaintiff requested, which are reviewed and considered by the court on this appeal, and the evidence relating to the points covered by such parts of the charge, and to such requests to charge, appear in the opinion of the court.

H. P. Hastings, for appellant, argued the following points.

I. The court erred in admitting evidence for the purpose of showing any assent of Moore to what the sheriff did, and in submitting any such assent to the jury.

1. The complaint charges the defendant with a breach of duty in not moving the coal from the vessel, and the answer, so far from setting up any interference of the plaintiff with the execution of the order of delivery, admits the leaving the coal on board, and insists in law that it was not the defendant's duty to remove it, till the sureties should justify. The only

question upon this part of the case is, whether the law required the defendant to remove it. If it did, the consent of Moore would discharge the sheriff, but such affirmative defence should have been pleaded (*Kelsey v. Western*, 2 Com. 506).

2. The evidence given was not sufficient to authorize a jury to find that Moore in any manner dispensed with any duty of the sheriff, or interfered with the execution of the order, or made the deputy or keeper his agent to take care of the property. On the contrary, the evidence of one of the defendant's witnesses is, that Moore referred the party to his attorney, and refused to interfere even by taking the property into his possession then; and of all, that the deputy said the coal was in his possession, and the keeper was his deputy to take care of it.

II. The court erred in admitting evidence that Moore said he never meant to have sued the sheriff, &c.

1. The facts were all clearly proved, and this declaration of Moore could not tend to prove or disprove any material fact in the case.

2. Immaterial facts are none the more admissible because the declarations of the party.

3. The declaration relates only to the intention to sue, and in no manner negatives the existence of just cause of action.

4. If this evidence were merely irrelevant, the admission of it would be error; but it is worse than that—actually calculated to prejudice the jury against the plaintiff's case.

III. The court erred in refusing to charge that the plaintiff was entitled to recover upon the facts admitted in the pleadings and clearly proved.

1. Such charge is proper in all cases where the evidence is so clear, that a verdict the other way would be set aside as against evidence (*Woodbeck v. Keller*, 6 Cow. 118; *Stevens v. Fisher*, 19 id. 181).

2. There was no dispute about the facts that the plaintiff was entitled to the delivery of the property, when he demanded it, and the sheriff did not deliver it.

3. There was no dispute about the facts, that the coal was not taken from the vessel of Hoffman, nor Hoffman and his men expelled from the vessel, nor any keeper put in the possession or care of the vessel as to her safety.

4. There was no dispute about the facts, that the vessel was heavy laden, on the north-east side of the pier in an exposed situation; that the wind was from the north-east when the blow came on; that it came on gradually, and the vessel might have been removed, and that the other side of the pier was safe against any wind.

5. There was no dispute about the facts that the storm was coming on, on Saturday afternoon; that Mr. Hoffman called the keeper's attention to the question whether she would not sink, and that the keeper told him, Moore or the sheriff would be responsible, and that he should not remove the vessel.

6. There is no dispute about the facts, that the keeper was not charged to take care of the safety of the vessel, and did not take any care of it whatever.

7. There is no dispute about the fact, that she did sink where she lay.

8. The pleadings had admitted the fact, that the coal was not removed, nor the vessel removed, and insisted that it was not the duty of the sheriff to do either, and this was a question of law.

9. There was no fact, therefore, to submit to the jury, but the amount of damages, and, particularly, there could be no excuse for submitting whether the sheriff took reasonably prudent care of the coal from the danger of sinking, when the proof was that he took no care.

IV. The court erred in refusing to charge as requested by the plaintiff's second proposition. 1. If Hoffman was willing to have the coal delivered to Moore without justification of sureties, and offered that it might be, it was the duty of the sheriff to deliver it. 2. The court refused to submit whether such assent was given, or say what effect it would have, but submitted whether the parties agreed to settle the suit, which nobody pretended.

V. The court erred in refusing to charge that it was the duty of the sheriff to have taken the coal from the vessel and the custody of Hoffman, and put it in a secure place, according to the third or fourth proposition of the plaintiff. 1. The charge, without responding directly to this, substantially denies the correctness of the proposition, by submitting to the jury only

that if the sheriff, after leaving the coal on board of the vessel, did not take ordinary care, &c., he was liable. (*Lisher v. Pierson*, 2 Wend. 345 ; 11 id. 58 ; 17 id. 518. *Browning v. Hanford*, 5 Denio, 586. 5 Hill, 588. Opinion of Cowen in Supreme Court and Putnam in the Court of Errors, and authorities there cited.) 2. By saying that if Moore assented to leaving the coal on board, then the mere fact that the coal was not removed from the vessel would not make the sheriff liable, would seem to imply that he would be liable, if no such assent were given ; but this is only an evasion of the question proposed, and not answering it in favor of the plaintiff ; for, without regard to how the jury find upon the question of the assent, he submits that the sheriff is liable only if the keeper afterwards omitted ordinary care, without in any event authorizing a verdict for the plaintiff, on the ground that the coal was not removed, though it remained without the plaintiff's assent. 3. The charge that if Hoffman had objected to leaving the coal on board, it would have been the duty of the sheriff to have removed it, was calculated to mislead the jury and cause them to believe that it was purely a matter between the sheriff and Hoffman, whether the coal should be left on board ; whereas, Hoffman's acts or consents, one or the other, could not affect the plaintiff ; and the evidence was that Hoffman did object, and asked if there was no way the coal could be got off the vessel.

VI. The court erred in not charging as requested by the fifth proposition submitted by the plaintiff, that as the evidence showed that the vessel would have been safe if removed to the other side of the pier, and the sheriff neglected to remove her, or watch her safety, he is liable in this action. 1. These facts appear by uncontradicted evidence. 2. It appeared that the safety of the vessel was not watched at all. 3. The question whether the vessel would have been sunk if the sheriff had taken care of her safety, was not even submitted to the jury, but only whether he took reasonable care, when he took none. 4. The negligence was actually proved, and if the right of action depended upon negligence, the plaintiff was entitled to recover upon the evidence.

VII. The court did charge that the sheriff had no right as D.—II.

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against Hoffman to use the vessel as a place of deposit, but erred in declining to charge the residue of the eighth proposition of the plaintiff, that Hoffman was under no obligation to take care of the safety of the coal after the sheriff took charge of it; from which the jury inferred that it belonged to Hoffman to take care of it.

VIII. The court erred in refusing to charge as requested by the eighth proposition of the plaintiff.

IX. It also erred in refusing to charge according to the 9th proposition of the plaintiff.

X. The general scope of the charge as given, was erroneous, in placing the liability of the sheriff upon the question, not whether he took the property into his possession and put it in a secure place, but whether he took ordinary care of it where it was.

E. Sandford, for respondent, made the following points.

I. The evidence tending to show an assent of the plaintiff to the acts or omissions of the sheriff in leaving the coal on board the vessel, or in the place where it was in the vessel, was properly admitted. Such defence was set up in the pleadings. The gravamen of the action was, that as against the plaintiff the defendant had wrongfully and negligently omitted to take said coal from said vessel, and left the same in the vessel, and put keepers in charge of it there. These allegations are denied in the answer. The consent of the plaintiff to the act complained of, was a part of the evidence to sustain this issue on the part of the defendants. It was not in any sense new matter. In *Van Gieson v. Van Gieson*, the Court of Appeals decided that an averment of payment in an answer to an action on a note, was not a pleading of new matter, but was merely taking issue on a material averment of a breach of the contract. It amounted only to a denial of a material allegation in the complaint. The allegation, if made in defendant's answer, of an assent of the plaintiff to the acts complained of, would have been, in legal effect, a denial that the defendant had been guilty of the negligence charged. Facts, and not the evidence to prove the facts, are to be alleged in

the pleadings. (*Corwin v. Corwin*, 9 Bart. 219, 226. *Stone v. Depuga*, 4 Sandf. S. C. R. 681.)

II. The evidence given was for the consideration of the jury, in connexion with all the circumstances of the case. There was evidence for their consideration, and whether the court would or would not have come to the same conclusion upon it at which the jury arrived, the verdict will not be set aside from any possible difference between the court and the jury as to its effects. This issue has been tried already before three different juries, each of whom have rendered a verdict for the defendant, and the questions of fact should be deemed to be settled by three concurring verdicts. (*Green v. Brown*, 3 Bart. R. 119. *Douglas v. Trusey*, 2 Wend. 352-56. *Kee-ler v. Firemen's Ins. Co.*, 3 Hill, 250-56.)

III. The evidence of Moore's declaration was competent, because it was made by the plaintiff, and relevant, because it related to the subject of this suit. It was quite material as showing, in connexion with the other evidence, an implied admission by Moore that he knew that the defendant had not omitted to perform his duty. It was for the jury to say how far it negatived the existence of a just cause of action. It is sufficient for the court that it had a bearing on that question.

IV. The court properly refused to charge that, upon the facts admitted by the pleadings, and those proved by uncontradicted testimony, the plaintiff was entitled to recover. 1. There was clear proof of the fact, that when the papers were served, Hoffman offered to give up the coal, and plaintiff declined to receive it, and referred Hoffman to plaintiff's attorney. This was a refusal to accept it until costs were paid. 2. It is equally undisputed, that up to the time of the service of the papers, all parties deemed and believed the coal to be perfectly safe where it was. 3. It is equally clear that plaintiff knew where the coal lay; knew that the sheriff put keepers over it in that location, and expected to retain it there until the sureties justified. That the plaintiff made no suggestion in regard to its removal. 4. That the captain of the vessel made no objection to the use of the vessel for that purpose. That the vessel was properly manned at the time with persons to look after its safety, and the only duty to be performed by

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the defendant was to see that no coal was removed. There was no expulsion of Hoffman and his men from the vessel, nor any interference with their moving her, so long as the coal was not carried away. 5. That whether the safety of the vessel on one side of the pier would be greater than on the other, depended wholly upon the course from which the wind should happen to blow. That she was safe where she was all Saturday night, and all Sunday, and until Monday morning; if she had been moved, and the wind had happened to shift, and blow from the south-east, she would have been carried into a more dangerous situation. 6. That the vessel had been lying along side of the wharf, where she sunk, all the time for two weeks, only four days of which her coal was in charge of the sheriff. That plaintiff's yard was two blocks from the vessel. That plaintiff had no apprehensions for its safety during this storm; and that all parties acted upon an honest conviction that the vessel and coal were safe as they were. 7. That the removal of the coal from the vessel, and the hiring of a place to store it, until the sureties justified, would have been very expensive to the plaintiff; this view, no doubt, influenced him, in sanctioning the effort of the sheriff to retain the coal as it was, so that but one removal might be made. 8. Although it be true, that the vessel did sink where she lay, there can be no dispute that the coal was in her at the time, by the assent of the plaintiff, to save expense to him; that he afterwards took the coal without objection, and said he never intended to commence this suit. 9. The sheriff was not bound to exercise any greater care than Moore did, as a prudent and reasonable man, before the levy. Moore had left the coal for ten days in that vessel, in the same place, with the vessel in the same charge. The defendant put a keeper over the coal, and otherwise took the same care that plaintiff did. 10. It was a question entirely for the jury, whether the attempt to move the vessel after the storm had commenced, in view of the difficulty of getting around the end of the pier against the wind and waves, and the probable change of the wind, would not have been more hazardous than to leave her as she was.

V. The evidence did not warrant the charge secondly requested. Moore said, in answer to that offer, that "he could

not take it then, he had nothing to do with it then, and Hoffman must see Moore's attorney."

VI. It was a question for the jury, upon all the evidence, whether the vessel, where it was, was not in a reasonably secure place to keep the coal; and the fourth request to charge was properly refused.

VII. It was also a question for the jury to say, whether there was not exercised all reasonable and proper care to guard against the sinking of the vessel; placing her at a suitable wharf, in a reasonably secure position, and there leaving her fast, would be such proper care. It was not necessary that it should have been watched, after these precautions, with an eye that never sleeps. Watching could not have prevented her sinking. The question of the sufficiency of the watch and the expediency and duty of removal, were for the jury.

VIII. The evidence shows that Mr. Hallenbeck thought she was safely moored and fastened; that he was an experienced navigator; that she was properly fastened at the time; and that if all hands had been there on the morning of the accident, they could not have prevented it. It was for the jury, upon the evidence, to decide the issue whether the defendant had been guilty of any negligence.

IX. The seventh request to charge had no bearing on the merits of this case. The eighth request presented only a part of the evidence bearing on the general question of negligence, and the judge was not bound to submit separate portions of the testimony in that form to the jury.

X. The charge of the judge was correct, unless the parties so agreed to settle as to discharge the sheriff. There was no determination of his rights or liability by their agreement.

XI. The judge correctly defined the rule by which the jury were to be guided in coming to their determination of the issue upon the evidence. Also in reference to the inference they might draw from the circumstances of an assent on the part of the plaintiff, and in the legal conclusion, if the jury should find such an assent.

XII. There was no room for any pretence or question upon the evidence, that the *vessel*, in the position she occupied at the time of the levy, was not in as safe a place to keep it, as

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in any other that could have been selected. There was no duty, imposed by law, upon the sheriff to remove it from that place. The only question arising upon the evidence was, whether there was any want of care in guarding the property against the storm which subsequently arose, and which sunk the vessel. That storm alone created the danger and the injury. This question was fully and fairly submitted to the jury. It is settled law that a sheriff is not liable for any loss to goods by fire, or other accident, unless it is connected with his own negligence. (*Browning v. Handford*, 5 Hill, 588, 591; Story on Bailments, §§ 130, 620; *Jenner v. Joliffe*, 6 J. R. 9.) The sheriff is responsible only for good faith and ordinary diligence; and the law requires some proof of negligence, to overcome the legal presumption that he has done his duty. Showing that a loss has happened, does not throw the burden of proof on the officer; it must also be shown that when it occurred he was not exercising such ordinary diligence as belongs to a prudent and honest discharge of his duties. (*Burke v. Trevitt*, 1 Mason's R. 96, 101.) Neither of the cases cited by the plaintiff tends to sustain his proposition that the law made it the duty of the sheriff to have the coal taken from the vessel at any time. *Browning v. Handford*, 5 Denio, 586, was decided solely upon the effect of taking a receipt for the property; and *Lisher v. Pierson*, in the several volumes of Wendell cited, turned upon the provisions of the Revised Statutes, relative to the situation of the property where a claim of title was interposed, until that claim should be tried.

The plaintiff was not only bound to show that the sheriff did not remove the boat, and that by removing the boat, the loss might have been prevented; but also to show such circumstances as made the omission to do so a neglect of ordinary prudence on the part of the sheriff. There is no fixed rule of law prescribing his action, and the question, in all cases of this class, is, whether in the exercise of due care and caution, the course pursued was that which a reasonably prudent man would have adopted; and this is a question exclusively for the jury. (*Williamson v. Howard*, 13 How. 101, 109.)

XIII. The charge of the judge fairly and fully submitted to the jury the only question in the cause, which was, whether

the sheriff had been guilty of the negligence charged in the complaint. The particular propositions presented by the several requests to charge, embraced only partial views of portions of the evidence, and were not propositions of law; so far as it was proper to include them, they were embraced in the charge as given.

XIV. Three several juries have concurred in the verdict that the defendant was not guilty of the neglect charged. After these repeated verdicts upon a question of fact, the court should not interfere, even though the verdict should, in their opinion, be against the weight of evidence. (*Fowler v. Etna Ins. Co.*, 7 Wend. 270; *Ex parte Bailey*, 2 Cow. 479; *Ackley v. Kellogg*, 8 Cow. 223; *Felter v. Whipple*, 8 J. R. 369; *Jackson v. Zimmerman*, 12 Wend. 299; *Overseers of Poor of Rochester v. Lunt*, 15 Wend. 565.)

XV. The judgment should be affirmed, with costs.

H. P. Hastings, in reply, made the following points.

I. The evidence of plaintiff's consent that the coal should remain on board of the boat, does not tend to rebut the charge of negligence, but only that the sheriff was excused from ordinary diligence; it is in the nature of a license, which should be specially pleaded. This case differs from *Van Gieson v. Van Gieson* in this, that in that case the plaintiff in his complaint, was obliged to aver non-payment to make out his breach, and proof of payment negatived one of the material allegations of the complaint. Not so in this case; the plaintiff does not aver that the coal was left without his consent, nor was he bound so to do. The plaintiff could not be prepared by the pleadings to meet any such state of facts. The evidence was clearly inadmissible.

II. The verdicts of the jury establish nothing, because they have been set aside for error in law.—*Non constat*, but if the ruling of the court had been correct, the verdicts would have been the other way. We are to presume they would, or the court would not have set them aside.

III. The evidence of Moore's declaration that he did not intend to sue the sheriff, was clearly inadmissible, because the

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only question for the jury was, whether the plaintiff had a just cause of action. His intentions did not, nor could not affect the justice of his cause of action. Most men do not sue when they have a just cause of action, and frequently express their intentions to that effect, and many do when they have not. It is a declaration which may be used in the hands of a skilful counsel to prejudice a cause, and throws no light at all upon the merits of the cause.

IV. If the facts admitted in the pleadings, and the evidence in the case clearly showed that the plaintiff was entitled to recover, the court ought to have so charged. 1. Referring a party to his attorney, is not tantamount to a refusal to receive a delivery, but the reverse. 2. The fact that the boat was safe when the papers were served, imposed the duty upon the sheriff, of keeping it so, and is no excuse for negligence. 3. If the plaintiff knew where the boat lay at the time the papers were served, he could not have known that it would remain there unless he possessed the gift of prophecy. It is plain that it ought not to have remained where it did. It might have been safe when he knew it, but it is perfectly plain it was not safe afterwards. 4. The coal was in the custody of the sheriff, and his custody was not interfered with by the plaintiff. Nor could it be. He had full and absolute control over it. The plaintiff had a right to look to him for its safe keeping. The sheriff cannot shift the responsibility of its safe custody from himself to the plaintiff. 5. The boat was safe, undoubtedly, until the approach of danger. Others saw the danger, and warned the sheriff. That there was danger, is proved by the loss. That it could have been foreseen and provided against is proved by the fact that the sheriff was warned in season, and a perfect protection suggested. Notwithstanding the variableness of the wind, experienced men could see the approach of danger. 6, 7, 8, 9, 10. There is no evidence as to the plaintiff's apprehensions, nor have they anything to do with the case. He could not interfere. Moore's conduct did not impose upon or release the sheriff from any duty. If Moore had been over careful, the sheriff would not therefore have been bound to exercise diligence. Moore did not pretend to interfere with the sheriff in any way in the

exercise of his duty, and there is nothing in the case to relieve the sheriff from his obligation to take due care of the goods. It is plain that he did not, and the jury ought to have been instructed to bring in a verdict for the plaintiff.

V. The fifth, sixth and seventh points of defendant, do not show that the plaintiff's request to charge secondly was incorrect. Moore's reference to his attorney was proper, because the whole matter was then in the custody of the law, and he did not know how far his own acts might affect his rights, but the sheriff interposed and made the reference of no effect. He claimed the absolute custody and control of the goods. He assumed all the responsibility of their keeping. Hallenbeck's experience as a navigator is problematical. He was employed three years on a steamboat. It might have been as a stoker. If watching would not have prevented the disaster removal would. The boat was not in a suitable and safe place. On this point the testimony was all one way. Any number of witnesses could not prove the contrary, and there is uncontradicted proof that the danger was apparent in time to afford a remedy. The negligence of the sheriff is placed beyond question. There is nothing to submit to a jury on this point, and if he was not excused by the act of the plaintiff, he is clearly liable.

VI. The seventh request to charge was proper, and the court ought to have charged in accordance with the request, because there had been an attempt to shift the obligation of taking care of the coal, upon the master; and because, as a matter of law, the master was under no obligation to take care of the coal—the sheriff had no right to impose any such duty upon him, and the jury ought to have been clearly instructed to that effect, that they might know as a matter of law where the obligation for the safe custody of the coal rested. The eighth request to charge is clearly correct, and embraces only a distinct point in the case, and the charge ought to have been in accordance with the request.

VII. If the sheriff choose to leave the coal on board the boat, and by the exercise of reasonable care the boat could have been removed to a safe place, the law imposed the duty of removal upon the sheriff, inasmuch as he assumed the exclu-

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sive custody and control of the coal. It is true that the storm alone created the danger, but this danger might easily have been averted; and it is preposterous to assert the contrary. The sheriff would not permit interference, even when warned of danger. Hoffman testifies without any possible interest and without apparent bias. It is preposterous to assert that because the coal was in the custody of the law, no one was bound to look to its safety and that it was necessarily devoted to perfectly apparent and inevitable destruction. The case of *Browning v. Hanford*, 5 Denio 586, is directly opposed to any such doctrine. But it is not necessary to invoke the doctrines of that case, to make the sheriff liable in this. This is a clear case of negligence on the part of the sheriff, and it is impossible to get around or over it. It is not true that those acting in a special or official capacity, are not bound to take more care of the property intrusted to their charge than a prudent man in the ordinary discharge of his business would with his own. They are paid for their care. It is their special duty. The charges of the sheriff for taking care of property are very onerous; and to say that he is only bound to take ordinary care after all, is absurd. There is no hardship in the case: the office of sheriff is not only voluntarily assumed, but eagerly sought after; the emoluments are large, the responsibilities are by no means commensurate.

VIII. The question of negligence is not the only question as stated in respondent's thirteenth point; and, as to that question, the appellant claims the benefit of all his exceptions.

IX. Where three several verdicts have been rendered, and two set aside as being against the weight of evidence merely, there might be some propriety in the court's hesitating to set aside the third for that cause only; but when the other verdicts were set aside for errors of law, there is no impropriety in asking the court to set aside the third as being against the weight of evidence, and if it is against the weight of evidence, the party is as much entitled to have it set aside as though it was the first verdict instead of the third.

X. The judgment should be reversed with costs.

BY THE COURT. BOSWORTH, J.—The judge charged that “the

jury might infer, if they thought the circumstances warranted it, an assent on the part of Moore to the leaving of the coal on board of the vessel. If this were assented to by Mr. Moore, the mere fact that the deputy sheriff left the coal on board of the vessel, would not render the defendant liable in this action."

The plaintiff insisted that no such question should be submitted to the jury, because no such defence was set up in the pleadings, and because there was no evidence authorizing the submission of any such question.

There was no evidence authorizing the submission of any such question, unless the fact that the plaintiff knew the coal was not removed, and did not remonstrate with the sheriff against such conduct, is evidence from which such an assent may be inferred.

An omission to interfere with a sheriff in his discharge of the duties imposed by law, or to object to, or complain of the manner in which he performs them, is no assent to his neglect or violation of duty.

The statute made it the duty of the sheriff to take the property (Code, § 209) and "keep it in a secure place" (id. 215), and deliver it to the party entitled to it.

The schooner may not have been a secure place in which to keep the coal. The schooner was heavy laden, leaked badly, and would probably have sunk, if not pumped daily.

The sheriff did not take any measures to have her pumped, and although this was done, it was not done by men employed by the sheriff, or acting under his authority, or who had assured him such services would be performed.

This instruction, as I view it, was equivalent to charging the jury that although the schooner might be an insecure place in which to keep the coal, yet no liability would attach to the sheriff merely in consequence of his having left it in that place, if they found that Moore assented to its being left there.

The further proposition submitted in connexion with this was, whether the sheriff was wanting in reasonable and proper care in guarding the property against the consequences of the storm, which subsequently arose, and during the continuance of which the vessel was sunk. The jury were instructed that

it was the duty of the sheriff to watch the property, and see if anything should arise, while it was in his custody, to endanger its safety, and to use due and reasonable care and diligence to prevent it; if that duty was not performed, he was responsible for the neglect, and the plaintiff was entitled to recover.

The plaintiff insisted that no such question should have been submitted, on the ground that there was no evidence tending to show that the sheriff took any care, or instructed any one for him to take any care, to prevent the vessel being sunk or injured by the storm.

As I read the evidence of Hallenbeck, the sheriff's agent, he swears expressly, "I had no charge to take care of the safety of the vessel; I was charged by the sheriff to take charge of the coal, and see that the vessel was not removed; I was not charged to see to her safety from sinking."

He was at the vessel between five and six o'clock in the afternoon preceding the night on which she sunk, and although there were strong indications of a storm, and his attention was called to the dangerous position and condition of the vessel, he did nothing with a view to her safety. At night he left a police officer of that ward in charge of her, to see that the vessel was not removed.

There was no evidence on which to submit the question, whether the sheriff was wanting in reasonable and proper care in guarding the vessel against the consequences of the storm which subsequently arose and sunk her. His own officer swore affirmatively that he neither took any such care, nor was charged by the sheriff with any such duty.

He also swears, that "on Saturday, in the afternoon, about 4 o'clock, the captain came and asked me what would be the consequence if she sunk? who would be answerable for the property? I said I could not say, but I suppose Mr. Moore or the sheriff; he then said he would not have anything to do with her; he spoke about moving the vessel; he never asked me if he could remove her; I should not have cared if he had moved her from that place, so long as the coal was safe; the vessel lay fifteen or twenty feet from the end of the pier; I told him if that vessel was taken away without my consent, or the sheriff's consent, he would be liable for stealing."

It seems to me that on such evidence it cannot be left to a jury to say whether the sheriff took reasonable and proper care to guard the property against the consequences of the storm.

No care was taken, or attempted to be, with a view to that object; no one was even left to watch it, with a view to guard it against such consequences. On the contrary, although it was raining and blowing in the afternoon, and although it looked likely for a storm, and in the night the wind increased in violence, nothing was attempted for the safety of the vessel. The agent went home and went to bed, and charged the police officer to see that the vessel was not removed, but not to do anything to prevent her being sunk.

She was sunk, and the jury may have exonerated the defendant, on the ground that Moore assented to the coal being left on board the vessel, and having so assented, the sheriff took proper and reasonable care to guard the coal against the consequences of the storm.

There was no evidence to warrant the submission of either of these questions, or on which a jury could properly find either of them in favor of the defendant.

So far as the case depended on these questions, I think the jury should have been instructed, that if the vessel, in the condition in which she then was, was not a secure place in which to leave and keep the coal, considering the season of the year, and the storms commonly incident to it, the sheriff was liable for any damages resulting from its being left in that place.

If he had removed the coal to a secure place, it would not have been damaged by the storm, and it is not to be assumed that it would have been equally damaged in a secure place.

It was damaged by being on the place where it was. The sheriff neither removed it, nor attempted to protect it from the storm that injured it, notwithstanding his attention was called to the danger of its position, to his liability if the vessel was sunk, and was told by the captain that he would have nothing to do with it.

It may very well be, that on another trial it may appear that the captain of the schooner assented to the coal being left

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on board, and to the use of the schooner by the sheriff, as a place of keeping it.

If this should be so, such evidence may possibly be given as will render it proper to submit to the jury as questions of fact, whether that was a secure place in which to keep the coal; and whether the indications of a storm were such as to require of the sheriff any extra precautions for the safety of the vessel.

On the case as presented to us, we agree in the opinion, that there was no evidence authorizing the submission of the question of Moore's assent to the coal being left where it was, or of the question whether the sheriff was wanting in proper care in guarding the property against the consequence of the storm which subsequently arose and during which the vessel was sunk. A new trial must be granted, with costs to abide the event.

HENRY KEEP, Respondent, *agt.* GEORGE P. LORD and SAMUEL N. BROWN, Appellants.

Where two persons are indebted to each other, on disconnected demands, and one becomes insolvent, the solvent party cannot maintain an action for that cause alone, to compel an equitable set-off before the debt owing by the insolvent party becomes due. If, before it becomes due, he assigns the demand against the solvent party, the assignee may recover the assigned demand, free from all claims of set-off on the part of the solvent debtor against the insolvent, where there is no pretence that the assignment of the claim was made with intent to defeat the set-off.

When no other ground exists to support an equitable set-off than the insolvency of one of two parties, severally indebted to each other, the right of set-off does not attach until the debt owing by the insolvent has become due.

(Before CAMPBELL, BOSWORTH, and EMMET, J.J.)

December 17, 1852. March 25, 1853.

THIS case came before the general term on an appeal from a judgment sustaining a demurrer to the answer to the complaint.

The plaintiff, as assignee of Charles King, brought this action to recover for goods sold and delivered by King to the defendants between the 20th of February and the 1st of July, 1851,

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on a credit which expired on the 25th of December, 1851. King assigned this account to the plaintiff on the 18th of September, 1851.

The defendants were owners of a note made by King on the 2d of June, 1851, payable six months after its date, and which was purchased by them on the 5th of June, 1851.

In their answer, they claimed an equitable right to set off the note against, and in extinguishment of, a like amount of the account, on the grounds that they owned the note when King assigned the account he had against them to the plaintiff; that King was then and since has been insolvent, and since then has moved out of, and ceased to reside in, this State. There was no allegation in the answer, that King assigned to the plaintiff with the intent to prevent one demand being set-off against the other, or that he knew when he assigned that the defendants owned the note mentioned in their answer, or that his subsequent removal from the State was fraudulent.

All other facts requisite to a full understanding of the case, are stated in the opinion of the Court.

A. P. Man, in behalf of the appellants, made and argued the following points.

I. It is a primary principle, that the assignee of a thing in action (other than negotiable paper) takes it subject to all equities between the original parties. (*Murray v. Sylburn*, 2d Johns. Ch'y R. 441, 443; 2d Story's Ev., § 1047; *Niagara Bank v. Roosevelt*, 9 Cow. 409.)

II. The present case is fully within the equity, if not within the letter, of the statutes of set-off.

III. The answer presents a clear case for an equitable set-off, and courts of equity have uniformly compelled a set-off under like circumstances.

(See cases below cited.)

1. The counter-claim or set-off is properly presented by answer. It was not necessary to file a cross-complaint. (*Jennings v. Webster*, 8 Paige, 503; *Gay v. Gay*, 10 Paige, 369, 377.) 2. The power of courts of equity to compel a set-off is not derived merely from the statute. It rests upon the original

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jurisdiction of courts of equity, and upon their general power over their suitors. (*Gay v. Gay*, 10 Paige, 369, 376; *Simpson v. Hart*, in error, 14 J. R. 63; *Merrill v. Fowler*, 6 Dana, on p. 306; 2d Story's Eq. Jur., §§ 1431, 1432, 1437, 1444.) 3. The true and actual debt due from defendants to King, at the time of his assignment to plaintiff, was only the balance between their respective demands against each other. This was the rule of the civil law, and has always been acted upon by courts of equity. 4. The facts of the insolvency of King, and his removal beyond the State, and that defendants have no security for their note, are controlling reasons with a court of equity for compelling a set-off. (*Lindsay v. Jackson*, 2d Paige, 581; *Gay v. Gay*, 10 Paige, 369, 376; *Stewart v. Chamberlin*, 6 Dana, 32; *Merrill v. Fowler*, 6 Dana, 305; *Jennings v. Webster*, 8 Paige, 503. 5. A court of equity, under such circumstances, would compel a set-off, even against a plaintiff who had purchased for actual consideration paid at the time. It certainly would, in a case like the present, where no consideration has passed. (*Stewart v. Chamberlin*, 6 Dana, 32; *Merrill v. Fowler*, 6 Dana, 305; *Chance v. Isaacs*, 5 Paige, 592.) 6. The fact that the note of King was not due at the time when he assigned the book account to the plaintiff, does not impair the equitable right to a set-off. The right to an equitable set-off became perfect the moment King became insolvent. It was enough, at any rate, that the note would mature before the account. (*Chance v. Isaacs*, 5 Paige, 592; *Lindsay v. Jackson*, 2 Paige, 581; *Gay v. Gay*, 10 Paige, 369.)

E. S. Young, in behalf of the respondent, made and argued the following points.

I. The claim of the defendants is not a demand against the plaintiff, nor is it such as might have been set off against Charles King, the assignor, while the demand on which suit is brought belonged to him. (2 R. S., 3d ed., p. 450, § 39, sub. 7, 8, 10, 11.) The defendants' demand had not become due at the time of the assignment to plaintiff of demand on which suit is brought; consequently, no right to set off defendants' demand existed at the time, and the assignee took the claim

clear of any right of set-off against it. (*Wells v. Stewart*, 3 Barb. S. C. Rep. 40; *Graves v. Woodbury*, 4 Hill, 559; *Spencer v. Barber*, 5 Hill, 569; *Watts v. The Mayor, &c.*, 1 Sand. Supr. Ct. R. 23; *Beckwith v. The Union Bank*, 4 id. 604.)

II. The defendants have no right, in equity, to set off the note held by them against the plaintiff's demand.

1. The demands are independent, and not connected with each other. To be the subject of set-off, in equity, under its extra statutory jurisdiction, there must be a connection between the demands. (2 Story's Eq. Jur., § 1434; *Schermerhorn v. Anderson*, 2 Barb. S. C. Rep. 584; *Rawson v. Samuel*, 1 Craig and Phil. 161, 173, 174, 178.) 2. No equitable right of set-off in favor of the defendants, had attached at the time of the assignment to plaintiff, the note held by them not being then due. A court of equity would not interfere to enforce or establish a set-off in their favor of a claim not due. The doctrine of equitable set-off has never been carried to the extent of changing the contracts of parties. (*Bradley v. Angel*, 3 Com. 475; *Spencer v. Barber*, 5 Hill, 569; *Ainslie v. Boynton*, 2 Barb. S. C. Rep. 263; *Lindsay v. Jackson*, 2 Paige, 584; *Duncan v. Lyon*, 3 John Ch. Rep. 358, 360.)

By THE COURT. BOSWORTH, J.—The debt owing to King by the defendant, was for goods sold and delivered by him to them between the 20th of February and the 1st of July, 1851, and became due on or about the 25th of December, 1851.

King, on the 18th of September, 1851, assigned to the plaintiff, in trust for the payment of his debts, all his property, including the debt owing to him by the defendants.

About the 5th of June, 1851, the defendants purchased a note against King for the payment of \$300, payable six months from June 2d, 1851, or on the 9th of December following, being a few days prior to the maturing of the demand on which this action is brought.

The defendants insist on the right to set off the amount of the note in satisfaction of a like amount of the debt or demand on which this action is brought, on the grounds that they owned

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the note when King assigned his account against them to the plaintiffs; that he then was and since has been insolvent, and since then has moved out of, and has ceased since to reside in, the State.

It is perfectly well settled that such a set-off cannot be made under any provision of the Revised Statutes, as neither demand was due when King assigned to the plaintiff. (2 R. S. 354, § 12, sub. 8, and *id.*, p. 174, § 43.)

But the defendants insist that the case presents a natural equity, entitling them to a set-off, and insist in their answer, under §§ 149 and 274 of the Code, for the same relief that a court of equity would have given them on a bill filed to compel the set-off to be made.

This is not a suit between King and the defendants, and neither demand was due when King assigned to the plaintiff. If, on a bill filed by the defendants against King on the day, but before the assignment was made, stating the facts contained in their answer, they would not be entitled to a decree making the set-off, then the judgment appealed from is correct, and must be affirmed. No case has been cited in which such a bill was sustained on such grounds, where the debt owing by the defendants was not due at the time the bill was filed.

In *Lindsay v. Jackson*, 2d Paige, 584, a set-off was decreed, but the demand against the defendant was due when the bill was filed. The demand against the complainant was not due. It was the duty of the defendants to pay at once and without delay. The complainants alone had an interest in having the credit on the demands against themselves to which the terms of their obligations entitled them. And, in that case, no third persons had acquired any legal or equitable right.

In *Chance v. Isaacs & Smyth*, 5 P. 594-595, the Chancellor intimated that, in that case, if the complainant had held and owned the note against Isaacs at the time the latter assigned a demand he had against the complainant to Smith, he would have decreed the set-off, on the ground that, although the note held by "Chance was not due at the time of the assignment, yet, as it would have become due long before the complainant's notes were payable, an equitable right of set-off would then have existed, which it would have been unconscientious on the

part of Isaacs to deprive him of by assigning the complainant's notes to other creditors."

The same remark is applicable to this opinion as the same learned Chancellor made concerning an opinion intimated by Chancellor Sandford in *Troup v. Haight*, Hop. R. 270, viz. "that it is not entitled to the force of a judicial decision, and was not called for by the case before him; nor does it appear to be founded upon any adjudged case." (*Jennings v. Webster*, 8 P. 505.)

The opinion intimated in *Chance v. Isaacs*, 5 Paige, 595, professes, on its face, to have no other authority for its support than the principle of the case of *Lindsay v. Jackson*. In the latter case, the bill was entertained because the debt owing by defendant was due at the time the bill was filed, and the Chancellor there said that it might present an entirely different question if the defendant's debt was now due from the complainants, who were seeking to compensate it by a claim against the defendants, payable at a future day." (*Young v. Gye et al.*, 10 J. B. Moore, 198.)

In *Gay and others v. Gay*, 10 Paige, 269, before and at the time J. P. Gay assigned to Messrs. Lee and Morrison, the defendant owned judgments against J. P. Gay, recovered on notes endorsed by defendant for J. P. Gay's accommodation, and which defendant had paid. The judgments were due at the time of the assignment, and the demand assigned was due, and the amount owing by defendant had been liquidated by a master's report. It therefore presented a case in which the party seeking to compel the set-off had a demand against the other, which was due when the latter assigned the demand belonging to him.

In *Bradley v. Angel*, 3 Coms. 475, the Court of Appeals denied the right of set-off, although the plaintiff's debtor was dead, and his estate insolvent, on the ground that the debt against his estate was not due when the bill was filed. In that case, the debt owing to the defendant by the plaintiffs was due. Allowing a set-off before the debt owing by the defendant becomes due, is compelling him to pay before the time stipulated by his contract, and is making a new contract for him.

This, it is believed, a Court of Equity never attempts to do,

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in a case of independent and disconnected demands, on the mere ground of the insolvency of one of the parties.

Unless there has been a mutual credit, founded on a subsisting debt on the other side, or an express or implied agreement of set-off, it will not be done. (*Howe et al. v. Shephard et al.*, 2 Sum. 414-418; *Gordon v. Lewis*, id. 629; *Dade v. Irwin's Ex'rs*, 2 How. S. R. (U. S.) 383, 390.)

In *Ainslie v. Boynton*, 2 Barb. S. C. R. 263, the assigned claim had been liquidated in amount by a report of referees before it was assigned; and before and at the time it was assigned, the plaintiffs held a judgment against the assignor of the claim. The plaintiff's claim was due when the assignment was made, and the amount of the claim against him had been then ascertained and liquidated.

I find no adjudged case to the effect that one of two parties, having distinct and disconnected demands against each other, neither of which is due, can, on the mere ground of the insolvency of the other, file a bill against the insolvent and compel a set-off against the other. Unless this can be done, no bill could have been filed by the defendants against King, on the facts stated in the answer, at any time prior to his assignment to the plaintiff. No equitable right to a set-off had then attached, because neither debt was then due, and there was no connection between them, creating an equitable right to have one debt made to compensate the other.

I do not find, in any of the cases cited on the argument, nor in any which have come under my observation, any opinion in favor of the contrary doctrine, except that intimated in *Chance v. Isaacs*, 5 Paige, 505, and this intimation is opposed to one made by the same Judge in *Lindsay v. Jackson*, 2 Paige, 584-585, on this point.

It seems to me that the principle decided in *Bradley v. Angel*, is conclusive upon this question.

Whether the debt owing by the party against whom a set-off is sought matures before or after the one owing to him, does not seem to affect the principle.

Although maturing first, he cannot be compelled to pay it before it is due by the terms of his contract. Where there is no fraud, and no agreement to set it off against a debt owing

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to him, and where there is no connection between it and any such debt, he cannot be compelled to pay it before the time he contracted to pay it by cancelling and discharging a debt owing to him by a person to whom he is thus indebted.

The fact that the debt owing by the party against whom the set-off is sought falls due last instead of first, throws no difficulty in the way of adjusting equities to the accuracy of a penny, and if insolvency alone is a sufficient ground for administering an equity at variance with the statutory rules of set-off, it would seem to be at variance with reason and right to hold that a set-off might be compelled if the demand owing by the defendant fell due sixteen days before the one owing to him, but could not be, if it fell due sixteen days afterwards.

But if it can only be compelled on a bill filed after the demand against the defendant is due, no principle is violated. The defendant, in such a case, owes a debt which, in equity and good conscience, he should pay instantly. No injustice is done him, and no new contract is made for him, by compelling him to pay, by receiving a credit for it, before a demand owing to himself by the person to whom he is indebted, and who has a strict right to immediate payment.

The principle of such a rule is, that, in case of distinct and independent demands owing by each of two persons to the other, an equitable right of set-off attaches, if one becomes insolvent, the moment the demand against the insolvent becomes due, and not before.

That, where insolvency is the only equity for enforcing a set-off, contrary to the provisions of the statute, such equity gives no right to compel the insolvent to pay before the demand against him has become due.

(*Gordon v. Lewis*, 2 Sumner, 633-634; *Bradley v. Angel*, 3 Coms. 475; *Wells v. Stewart*, 3 Barb. S. R. 40; *Schermernhorn v. Anderson*, 2 id. 584; *Spencer v. Barber*, 5 Hill, 569; *Graves v. Woodbury*, 4 id. 559.)

If this be the true rule, then no equitable right of set-off had attached at the time King assigned to the plaintiff. We are of the opinion that the judgment appealed from should be affirmed.

Van Wyck v. McIntosh.

HENRY L. VAN WYCK & WM. A. KOBBE v. JOHN MCINTOSH.

On the trial of this action, in which the defendant was sought to be charged, as the endorser of a promissory note, J. M. was offered as a witness on his behalf, and was rejected, on the ground that he had guaranteed the payment of the note, if the endorsement should be proved to be genuine, and had deposited the sum due on the note in the hands of a third person, under an agreement that it should be paid over to the plaintiffs, in the event of their obtaining a verdict.

Held, that he was not a person for whose immediate benefit the suit was defended within the meaning of the Code, and was, therefore, notwithstanding his interest, a competent witness.

On this ground a new trial granted.

(Before DUKER, CAMPBELL, & PAINE, J.J.)

December 20, 1852; March 26, 1853.

MOTION for a new trial upon a case. The action was against the defendant, as the first endorser of a promissory note for \$2,045 $\frac{1}{4}$, purporting to have been made by Messrs. McIntosh & Co., payable to his order. It was defended on the ground that the endorsement was forged. On the trial, which took place before Mr. Justice Sandford, and a jury, in May, 1852, many exceptions were taken to the ruling of the judge, which it is deemed unnecessary to state, as the decision of the court in granting a new trial, proceeded on the single ground that the testimony of a particular witness, who was offered to be examined on the part of the defendant, had been improperly rejected.

The statement in the case, in relation to this witness, is as follows:—

The defendant's counsel called as a witness,

John Mansfield, who was duly sworn, whereupon the plaintiff's counsel objected to the witness as incompetent, on the ground of interest, and in support read the following papers:

“For value received, I hereby guarantee to Mr. William

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Kobbe the punctual payment, at maturity, of a note of Thomas McIntosh & Co., drawn in favor of John McIntosh, and by him endorsed, dated Nov. 13th, 1850, on six months, and due on the 13th and 16th of May next, for thirteen hundred and thirty-seven $\frac{1}{4}$ dollars.

"And another note, dated Nov. 14th, 1850, at six months, drawn by the said Thomas McIntosh & Co., in favor of John McIntosh, and by him endorsed, due the 17th of May next, for two thousand and forty-five $\frac{1}{4}$ dollars, in such a manner as if the same notes were endorsed by me. Dated New York, March 31st, 1851.

(Signed)

"JOHN MANSFIELD."

"Note due May 16, \$1,337 40

" " " 17, 2,045 35

 \$3,382 75"

"\$2,045.35."

"New York, Nov. 14, 1850.

"Six months after date, we promise to pay to the order of Mr. John McIntosh, two thousand and forty-five $\frac{1}{4}$ dollars, at No. 133 Pearl street. Value received.

(Signed)

"THOMAS MCINTOSH & Co."

(Endorsed)

"JOHN MCINTOSH."

"The undersigned having for a valuable consideration severally guaranteed to William Kobbe, one of the firm of Van Wyck & Kobbe, the punctual payment of a promissory note, of which and of the endorsement thereon the foregoing is a copy, and said note not having been paid, and said Van Wyck & Kobbe being the owners and holders of said note, having demanded of us severally the payment thereof, and said John McIntosh having denied that he endorsed said note, and we being severally liable to pay the same if the said endorsement is genuine, and being desirous to have that question settled in an action against said John McIntosh, as endorser thereof: Now, in consideration of the premises, and in consideration also that said Van Wyck & Kobbe will commence an action against said John McIntosh, as endorser of said note, and prosecute such action to final judgment, which we hereby

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severally request them to do, we promise and agree to and with said Van Wyck & Kobbe, that in the event they shall recover a final judgment against said John McIntosh, as endorser of said note, or against his executors or administrators, that we will, upon the recovery thereof, pay the amount thereof to said Van Wyck & Kobbe, their executors, administrators, or assigns, and the costs and reasonable counsel fees which they may pay or become liable to pay in prosecuting said action to judgment by reason thereof. And said Van Wyck & Kobbe having agreed in consideration hereof, and of the security herein referred to, to commence and prosecute such action to final judgment, we agree to deposit with Messrs. Haggerty, Draper & Jones, of New York city, the sum of two thousand and forty-six dollars and eleven cents, at interest and upon trust; that it shall remain so deposited until a final judgment shall be rendered in said action; and, upon the rendition of a final judgment therein, that such moneys, and all interest that may have accrued thereon, shall be paid to said Van Wyck & Kobbe, their executors, administrators, or assigns, if the said judgment shall be in favor of said Van Wyck & Kobbe, their executors, administrators, or assigns.

“ Dated New York, May 28, 1851.

“ JOHN MANSFIELD,

“ H. ROBINSON.”

“ \$2,046 $\frac{11}{100}$.”

“ New York, June 4, A.D. 1851, received of John Mansfield, within mentioned, on interest, at the rate of six per cent. per annum, upon the trusts in the within agreement specified, two thousand and forty-six dollars and eleven cents, which sum, and the interest which shall at the said rate have accrued thereon, at the time final judgment shall be rendered in the action in said agreement mentioned, we agree to pay to Van Wyck & Kobbe, if such judgment shall be in their favor, and, if it be against them, to then pay the same to said John Mansfield.

“ HAGGERTY, DRAPER & JONES.”

The judge held the witness to be incompetent, and to his decision the counsel for the defendant excepted.

The jury found a verdict for the plaintiffs for the amount of the note with interest, to set aside which, a case, containing the evidence and the exceptions was made, which was ordered to be heard in the first instance at General Term.

It was now fully argued by the counsel of the respective parties, upon the evidence and the exceptions, but for the reasons before given, the arguments are omitted.

E. Sandford for defendant.

N. B. Blunt for plaintiffs, who, in support of the position that the testimony of Mansfield was properly rejected, cited *Davies v. Crum*, 4 Sand. S. C. Rep. 355.

BY THE COURT. DUER, J.—The witness, Mansfield, had certainly a direct interest in the event of the suit, since it was manifestly the understanding of the parties that he was not to be liable at all upon his guaranty, unless the endorsement of the defendant was proved to be genuine; but, although thus interested, he was not a person for whose immediate benefit the action was defended, within the meaning of the Code (§ 399), according to that interpretation of its meaning which we have heretofore adopted (*Catlin v. Hansen*, 1 Duer, S. C. Rep. p. 319). His interest, therefore, was not a ground of exclusion. He was not a *cestui que trust*, nor had he given an indemnity to the defendant, thus making himself the real and sole party in interest. The suit was prosecuted with the intent that the judgment, should a judgment be obtained, should be enforced against the defendant, and it was defended by him, not at the request of, nor for the benefit of Mansfield, but upon his own account, and with a sole view to his own protection.

The case would be wholly different were it understood that the moneys deposited by Mansfield and Robinson shall be applied to the satisfaction of a judgment against the defendant, so as to exonerate him entirely from its payment; upon this supposition the action would be defended for their immediate benefit, and their benefit alone. But such is evidently not the meaning of the agreement between them and the plaintiffs. The intention of the parties, we cannot doubt, is that if a judg-

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ment shall be obtained against the defendant, Mansfield and Robinson shall succeed to the rights of the plaintiffs, and be entitled to enforce the judgment for their own reimbursement. Had they paid the note as guarantors, without requesting this action to be commenced against the defendant, as endorser, they might have justly claimed a transfer of the note, so as to have enabled them to compel its payment by the defendant. To save themselves from a suit upon their guaranty, and from the necessity of commencing an action in their own name against the defendant, they entered into the agreement with the plaintiffs, but there is no reason to suppose that they meant to deprive themselves of the right of ultimately resorting, for their own protection, to the liability of the defendant; and it would be unreasonable to give this construction to their agreement. Upon the other questions, that were so ably discussed upon the hearing, we are not fully agreed, and therefore decline to express any opinion in relation to them, but we all agree, for the reasons that have been given, that the testimony of Mansfield ought to have been received. He was interested, but not incompetent.

There must, therefore, be a new trial, with costs to abide the event.

HORTON H. BURLOCK, Administrator, &c., of ELIZA A. F. BURLOCK, dec'd, v. JOHN PECK and GEORGE GORDON, Executors, &c., of ELISHA PECK, dec'd.

A., owning two lots of ground adjoining each other, sold and conveyed one of them, and by a clause in the deed provided that the grantee might erect a party wall on the line dividing the two lots, one half on each lot, and covenanted to pay for the wall when used; and A.'s grantee erected such a party wall, and then conveyed the lot and building so erected to B. *Held*, that B., on such party wall being used by A.'s subsequent grantee of the adjoining lot, might recover of A., and he being dead, of his executors, one half of the value of the party wall. *Held*, also, that B., having died intestate, after the party wall had been used and appropriated by the grantee of the adjoining lot, the action was properly brought by her administrator.

That the party wall, when used, was the property of B., and she was equitably entitled to receive the money to be paid for using it. That by using and

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appropriating it, the title to so much of it as stood on the adjoining lot was vested in the grantee thereof, and did not, on the subsequent death of B., descend to her heir at law. The right to compensation, was a right in action, enforceable at the suit of the administrator of B.

(Before DUKES, BOSWORTH, and EMMET, J.J.)

December 22, 1852; March 26, 1853.

ELISHA PECK, in his lifetime, owned in fee several lots of ground on the northerly side of Third street, between the First and Second avenues, each 20 feet wide, being Nos. 65 to 75 inclusive, No. 75 being the most easterly of the number.

On the 8th of April, 1839, Peck and wife sold and conveyed by deed to John Hanrahan, lots 65, 67, and 69. The deed, besides the usual full covenants of warranty, contained this clause, viz. "And the party of the second part has the privilege of building a party wall twelve (12) inches thick, extending six inches on each side of the easterly line, forty-two feet deep, which wall the said party of the first part agrees to pay for, when used, and that each party has the privilege of extending said party wall ten feet further on the same conditions."

In August, 1839, Hanrahan erected a dwelling house on lot 69, the most easterly of his three lots, and constructed the easterly wall twelve inches thick, six inches of it being on lot 69, and the other six inches on lot 71, which latter lot was yet owned by Peck. The wall was of the value of \$400.

On the 20th of March, 1840, Hanrahan and wife sold and by deed conveyed lot 69, to the plaintiff's intestate. The deed described the lot by metes and bounds, and conveyed the same "together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and also all the estate, right, title, interest, dower and right of dower, property, possession, claim and demand whatsoever, as well in law as in equity of Hanrahan and wife of, in, and to the same and every part and parcel thereof, with the appurtenances, unto the sole and separate use of the plaintiff's intestate, her heirs and assigns for ever."

In April, 1846, Peck sold, and by deed conveyed the lots 71, 73, and 75 to Hanrahan, together with all the tenements, hereditaments, and appurtenances thereunto belonging.

After this purchase, and in April, 1846, Hanrahan erected

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buildings on the three lots last named; and in the erection of the building on 71 used, and made a part thereof, the party wall of the intestate's building on the easterly side of lot 69.

The plaintiff's intestate died in October, 1847, leaving her surviving Thos. H. Burlock, a son, issue of her marriage with the plaintiff, Horton H. Burlock. The plaintiff was appointed her administrator in May, 1852. Mr. Peck died in Nov. 1851, and the defendants are his executors, and have qualified as such.

Neither Mr. Peck in his lifetime nor his executors, since his death, have paid anything for the party wall so used, either to the intestate or to the plaintiff. To a complaint stating these facts, the defendants demurred. Judgment was given for the defendants on the demurrer at Special Term, on the ground that the agreement of Peck to pay for the party wall, did not enure to the plaintiff's intestate, under the deed given to her, and that on the wall being so used, she as grantee had no right to recover the half of its value. From this judgment the plaintiff appeals.

H. H. Burlock, the appellant in person, made and argued the following points in support of the appeal :

I. The covenant respecting the party wall was a real covenant, running with the land—because, 1. There was a privity of estate between the covenantor and his grantee. 2. The covenant related to and was made for the benefit of the land. 3. It was the intention of the parties to the deed containing the covenant to make it a covenant running with the land. (*Spencer's Case*, 3 Coke, 66. *Law Library*, 27 vol., N. S. page 75 and notes. *Allen v. Culver*, 3 Denio, 297 and 298. *Norman v. Wells*, 17 Wendell, 136. *Vivian v. Arthur*, 1 B. and C. 410. S. C., L. R. 113. *Vernon v. Smith*, 5 B. and Ald. 1, (7) C. L. R. 8. *Holmes v. Buckley*, 1 Equity Cases Abridged, 27. *Brewster v. Kitchin*, 12 Mod. 166. 27 *Law Library*, 84 and 85, 92 and 93. *Morse v. Aldrich*, 19 Pick. 449. *Beddoe's Ex'rs v. Wadsworth*, 21 Wendell, 120. *Weyman's Ex'rs v. Ringold*, 1 Bradford, 53.)

II. The covenant amounted to a grant of an easement which was rendered appurtenant to the lands of the covenantor and his grantee. Such clearly was the intention of the parties to

the deed—because, 1. The land upon which the party wall was to be erected was granted and set apart by the covenantor and his grantee as and for a party wall between the property. 2. One half of the wall was to be erected on each lot, and the wall thus to be erected remained the sole property of Hanrahan, or his assigns, until Peck or his assigns used the wall and paid therefor a certain sum, to be ascertained. The wall then became the joint property of the owners of the contiguous lots. (See *Mott v. Hawkins*, 5 Taunton, 20. *Sherred v. Cisco*, 4 Sandford's Law Reports, 481.) 3. The conveyance of either lot carried with it, as an incident, the wall or the rights which the party had in and to the wall under the covenant. The burdens and benefits of the covenant were cast upon the respective owners of the lots. 4. If Hanrahan had conveyed to the intestate before building the wall, she would have had a right to build the wall under the covenant, and upon Peck's afterwards using the wall built by her he would be liable to pay one half of the expense of such wall. 5. If Peck or his grantee had or at any time should extend the wall ten feet further, the intestate, or her heir—devisee or grantee, would, on using such extended wall, be bound to pay one half of the expense thereof. 6. The covenant is in substance and effect, that Peck, whenever the wall shall be used either by him or his assigns, will pay therefor, to the owner of the contiguous lot, at the time of such use. 7. When Hanrahan used the wall, he not only used the part that was upon his own lot, but the part that was on the lot of the intestate. (See Laws of 1830, pages 349 and 350, § 2, § 4. Laws of 1831, page 392, § 1.) 8. No person is named in the covenant, as the party to whom the payment for the wall is to be made, and in such a case it is a well settled principle that the stipulation will be enforced in equity, in favor of the party for whose benefit it is intended, or who is the party legally or equitably entitled, though he be a stranger to the undertaking. 9. The intestate is the person for whose benefit the covenant was made, she being the owner of the lot 69 Third Street, and the easement attached thereto, in lot 71 Third Street, at the time of the use of the wall. (*Allen v. Culver*, 3 Denio, 297 and 298. *Norman v. Wells*, 17 Wendell, 136. *Hills v. Miller*, 3 Paige,

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256. *Trustees of Watertown v. Cowen*, 4 Paige, 510. *City of Cincinnati v. Lessees of White*, 6 Peters' R. 431. 3 Kent's Com. 433. *North Ipswich Factory v. Batchelder*, 5 N. H. R. 192. *Balley v. Wells*, 3 Wilson, 26. *Bucheridge v. Ingram*, 2 Vesey Jr. 317. *Brewster v. Kitchin*, 1 Lord Raymond, 317. *Holmes v. Buckley*, 1 Abridged Equity, 27. *Earl of Portsmouth v. Bunn*, 1 Barn. and Cress. 694. Cruise's Digest, title Deed, 32, Chapter 6, § 39, § 40. First American Edition. *Holmes v. Sellers*, 3 Lev. 305. 1 Inst. 147. *Willard v. Tillman*, 2 Hill, 276. *Demarest v. Willard*, 8 Cowen, 206. *Beddoe's Ex'rs v. Wadsworth*, 21 Wendell, 124. *Sampson v. Easterby*, 9 B. and C. 505. *Cubit v. Porter*, 8. B. and C. 254, 257. *Wiltshire v. Sidford*, 1 Mann and Ryl. 404. *Morgan v. Mason*, 20 Ohio R. 401. *Gray v. Cuthberton*, 2 Chitty's R. 482. *Lametti v. Anderson*, 6 Cowen, 302. *Thompson v. Rose*, 8 Cowen, 266. *Campbell v. Mosin*, 4 I. C. R. 344, 6 do. 21. *Vivian v. Arthur*, 1 B. and C. 410. Gale and Wheatley on Easements, 200 and 201. *Savage v. Mason*, 3 Cushing, 500. *Brown v. Pentz*, M. S. Superior Court, February, 1850, Affirmed by the Court of Appeals, April, 1851. *Weyman's Ex'rs v. Ringold*, 1 Bradford, 53. 1 R. S. 748, § 2.)

III. The conveyance of lot 71 Third street, by Peck to Hanrahan, did not discharge Peck from liability on his covenant, to pay for the party wall whenever it was used either by him or his grantee. It is like the case of a lessee and his assignee; both are liable, one on his express covenant, and the other by reason of his privity of estate. (Taylor's Landlord and Tenant, pp. 212 and 213.) The assignee may discharge himself from liability, by transferring his interest in the lease, but not the lessee; he always remains liable. (*Ibid.*)

IV. The plaintiff is entitled to recover from the defendants, the value of one half of the party wall built by Hanrahan, and on the lots 69 and 71 Third street, at the time of the conveyance by Hanrahan and wife, to the intestate—because, 1. The covenant itself cast the burden of paying for the wall, when used by Peck or his assigns. 2. The intestate was the owner of the lot and wall at the time the wall was used by Hanrahan, and neither Peck nor his assignee who used the wall, had then any interest in the lot or wall, and payment was not to be

made until the wall was used. 3. The intestate was, in fact and in law, the assignee of Hanrahan of the lot to be conveyed, and the entire wall. By the deed to her, all the right, title, interest, and claim of Hanrahan to the lot, house, and wall, passed. An easement appurtenant to the land passes with the land, though the deed neither mentions the easement, nor privileges and appurtenances generally, unless it be expressly reserved in the deed, or by another made at the same time. (2 Hillard's Abridgment, 119 and 349; 3 Kent's Com. 433; *Pat-tison v. Hull*, 7 Cowen, 747.) 4. The privilege to use the land of the testator, for the building of the party wall, given in the deed to Hanrahan, operated as a grant of the use of six inches of the land of the testator for that purpose, and that privilege beyond all doubt was one running with the land, and passed to the intestate by the deed to her. 5. That part of the covenant being one running with the land, the whole of it is, as the covenant cannot be broken into fragments, and part be a real covenant, and part a personal one. 6. When Hanrahan conveyed to the intestate it was an unbroken covenant respecting the land, and something to be done concerning it, to wit, the using of the wall and paying for one half of it at the time of using, and the covenant not only related to so much of the wall as was built on the lot of either owner, but each had an interest in the entire wall and the land it covered. (*Weyman's Ex'rs v. Ringold*, 1 Bradford, 60, 61; *Matts v. Hawkins*, 5 Taunton, 20; *Campbell v. Mezier*, 4 John. C. R. 337, 6 do. 21.) 7. That assigns are not named in the covenant makes no difference; the deed to the intestate passed to her all the equitable interest that Hanrahan had under the covenant, whether the covenant runs with the land or not, and gave her a right of action in her own name since the Code. (Code of 1851, § 111; *Thompson v. Rose*, 8 Cowen, 266; 4 Kent, 159; *White v. Whitney*, 3 Metcalf, 81; Platt on Covenants, 481; 3 Law Library, 315; Smith's Leading Cases, 89.) 8. Although assigns are not named in the covenant, they are necessarily implied; the land is granted to Hanrahan, his heirs and assigns for ever, and by reference to the grant of the land the assigns of the grantee are clearly named. 9. The grant of the land being to Hanrahan, his heirs and assigns, the deed may read thus, "the parties of

the first part grant and convey to the party of the second part, his heirs, and assigns, for ever, all that certain piece of land, &c., with the privilege, &c."

V. The judgment in favor of the defendant is clearly erroneous, and should be reversed with costs, and judgment rendered for the plaintiff for the amount claimed.

H. Holden, counsel for respondents, made and argued the following points.

I. The complaint does not state facts sufficient to constitute a cause of action.

II. There is no covenant on the part of Peck, the testator, running with the land, by which Mrs. Burlock acquired any right whatever. The covenant related to a thing not *in esse*, but to be done upon the land, and Hanrahan's assigns are not named. (*Tullman v. Coffin*, 4 Comstock, 134; *Thompson v. Rose*, 8 Cowen, 266; *Allen & Paxson v. Culver*, 3 Denio, 284-296; *Weyman's Ex'rs v. Ringold*, 1 Bradford, 40.)

III. The deed to Mrs. Burlock describes the land only, by metes and bounds, no reference is made to a party wall, nor is a dwelling-house named. Mrs. Burlock took, and her heir holds, all that she purchased or intended to purchase. Whatever rights Hanrahan had, and which he did not convey expressly, he reserved.

IV. In pursuance of the agreement between Peck and Hanrahan, which was personal in its character, Peck actually paid Hanrahan for the party wall by conveying the adjoining lot to Hanrahan, which Hanrahan immediately improved—allowance was then made to Hanrahan for the party wall, and if the plaintiff now succeeds, the effect will be to compel Peck and his representatives to pay for the whole wall instead of half.

V. Each owner owns, in severalty, the portion of the wall situated on his own land—with no qualification except that neither has a right to pull it down without the other's consent. (*Sherred v. Cisco*, 4 Sandford, 480.)

VI. If the agreement set out in the complaint is a covenant running with the land, then Hanrahan (Peck's grantee) should pay for it; Peck never used the wall. The same Hanrahan,

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who was the grantee of Burlock, purchased of Peck the adjoining lot, No. 71, and was the first to use the wall by building on No. 71.

By THE COURT. BOSWORTH, J.—The conveyance by Hanrahan to Mrs. Burlock of lot 69, in March, 1840, transferred to her the title to the whole of the party-wall standing on the easterly line of the lot. Six inches of its width had been lawfully erected on lot 71. The right and privilege to so erect it, were given by the deed of 1839 from Peck to Hanrahan. Until Peck or his grantee of lot 71, built on the latter lot, and used the party-wall, the wall was the sole property of Mrs. Burlock, from the time lot 69 was conveyed to her.

Nothing had been paid for the party-wall up to the time she became the owner of lot 69. The party-wall was not used by any owner of lot 71, until over seven years after she became the absolute and exclusive owner of lot 69, and of the building erected thereon with its appurtenances, and of every claim and demand of her grantors of, in, and to the same.

When Hanrahan built on lot 71, and used the party-wall of the building, belonging to plaintiff's intestate, he appropriated to his own use her property. It was lawful for him to so appropriate it. But when it was so used she had a right to be paid one half of its value. If Peck was liable under his covenant to pay half of its value, she was entitled to the payment, for the reason that the property which had been taken and used was hers. (*Brown v. Pentz* (decided by the Court of Appeals), N. Y. Legal Observer, vol. i., p. 24; *United States v. Appleton*, 1 Sum. R. 492.)

Mrs. Burlock bought and paid for a lot with a dwelling-house on it, having half of one of its walls rightfully on an adjoining lot belonging to Peck, which party-wall he or his grantees had a right to use, but with respect to which he covenanted to pay half of its value when used. When it was used Mrs. Burlock owned it, and she was equitably entitled to the money. The sale and conveyance of property subject to a certain use on payment of a stipulated consideration, carries with it the right to receive such consideration, when the stipulated use shall be made of the property.

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We have not overlooked the numerous decisions of the Supreme Court of Pennsylvania, which hold that the claim to compensation for the use of a party-wall is personal to the first builder, is a mere chose in action, is not a lien on the land, will not pass to a grantee of the building of which it is a part by a conveyance of the lot and building with its appurtenances, and is only a personal charge against the builder of the second house. (*White v. Snyder*, 2 Miles, 395; *Oat v. Middleton*, id. 248; *Hart v. Kucher*, 5 S. & R., 1 Dallas, 341. *Ingles v. Bringham*, 10 Barr. 219; *Gilbert v. Drew*, 10 id. 155. *Todd v. Stokes*.)

These cases either arose under the statute of that State of the 24th of February, 1721, or were decided on the authority of cases thus arising. That statute provides that, "the first builder shall be reimbursed for one moiety of the charge of the party-wall, or for so much as the next builder shall use before he breaks into the wall." (*David v. Harris*, 9 Barr. 503.)

We are unable to perceive any substantial difference between this case, and *Brown v. Pentz*, and on the authority of the latter the plaintiff is entitled to recover, unless the objection is well taken, that the action should have been brought by the heirs instead of the administrator of Mrs. Burlock.

When this party-wall was used, her right of action to recover half of its value became perfect and absolute. This was in her life-time. The title to the half of the wall standing on 71, on, and after the time it was used by the owner of lot 71, was vested absolutely in him; and the owner of each lot, besides owning in fee the part standing on his lot, has, and from that time had, an easement in the other part for the support of his own house. The title to nothing for which Peck was to pay descended to the heirs of Mrs. Burlock. It would seem to be as clear that the administrator should recover for the half of the wall, as for the unpaid consideration money of land sold and conveyed by an intestate in his life-time. (*Hamilton v. Wilson*, 4 J. R. 72.)

We think the judgment appealed from should be reversed, and judgment entered for the plaintiff, but with liberty to the defendant to withdraw the demurrer, and answer in 20 days on payment of the plaintiff's costs upon the demurrer and of this appeal.

CALVIN E. HULL, Respondent, v. THOMAS CARNLEY, Sheriff,
and JOSEPH H. COLTON, Appellants.

Where, by the terms of a chattel mortgage, the mortgagee has an immediate right of possession, the property cannot be levied on and sold under an execution against the mortgagor.

But where the mortgagor has a right of possession for a limited period, the weight of authority is, that his possessory interest is a proper object of levy and sale.

The sale, however, in this case, must be confined to the interest of the mortgagor, for if the sheriff, having notice of the mortgage, sell the entire property as that of the mortgagor, he renders himself liable to the mortgagee, at least to the extent of the mortgage debt.

A provision in a mortgage that the mortgagor may retain the possession until a default in the payment of the debt, is no evidence of a trust, affecting the validity of the mortgage.

If the continual possession of the mortgagor under such a provision is any evidence of fraud, it only raises a presumption that may be repelled, and the finding of a jury or judge negating a fraudulent intent, is conclusive.

Upon these grounds judgment for plaintiff affirmed with costs.

(Before OAKLEY, Ch. J., DUER and PAINE, J.J.)

March 8. March 26, 1853.

APPEAL from a judgment at special term, in favor of the plaintiff.

The cause, by the consent of the parties, was tried by the Chief Justice without a jury, in October, 1852. The action was brought to recover against the defendants the value of three lithographic presses and fourteen lithographic stones, and the following are the material facts, as stated in the pleadings, and established by the evidence.

On the 14th of August, 1850, one Francis Michelin executed and delivered to the plaintiff a chattel mortgage, covering the presses and stones in question, to secure the repayment of \$230—\$100, with interest, in six months, and the residue in one year from the date of the mortgage; and, by an express provision in the mortgage, Michelin, until a default in payment, was to continue in the quiet possession of the property. On the day of its execution and delivery, a true copy of the mort-

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gage was filed in the office of the Clerk of Kings County, where Michelin resides.

On the 28th of September, 1850, the defendant, Colton, recovered a judgment against Michelin, in the Court of Common Pleas, for \$488.46; and immediately issued an execution thereon, which was delivered to the defendant, Carnley, then sheriff of the city and county. By virtue of this execution, Carnley, under an indemnity from Colton, levied upon and sold the property so mortgaged, as belonging solely to Michelin. Previous to the sale, written notice of the existence and terms of the mortgage had been given to him, and he was forbidden to sell in prejudice to the rights of the plaintiff.

The Chief Justice gave judgment for the plaintiff for \$261.88—the sum due upon the mortgage, with costs.

E. W. Chester and *A. J. Vanderpoel*, for the defendants, insisted that the property was subject to sale under the execution, and was rightfully sold; and, in support of their argument, relied upon the following points and authorities.

I. The sheriff, in levying, was bound to levy on the property in substance, and not upon a right or interest springing out of the property. The property, if rightfully subject to the mortgage, was sold subject to it, and was liable to pay the mortgage debt.

II. The sheriff, in levying on property so circumstanced, is only to inquire whether he may lawfully seize and sell, but is not bound, either in levying or selling, to admit or decide upon the validity of the mortgage. *Caveat emptor* applies to the purchaser. He gets the right and title of the defendant in execution, not the right of a third person. The sheriff is liable to such third person, only in case his right is such that the levy is a trespass.

III. The sheriff was not a trespasser—the mortgagee having neither the actual nor constructive possession, nor the right of possession, could maintain neither trespass, trover, nor case. In these actions was formerly to be found a remedy for every injury to personal property. The Code has created no new rights, but only changed the form of remedy for a wrong.

IV. The sheriff has not, either in law or in fact, destroyed

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any right of the respondent to the property, nor created any difficulty in the assertion of that right. The property was all sold to one purchaser. In law the mortgage is just as effectual against the property as before the levy; in fact, the property has been as much within reach of the mortgagee as if the levy had not been made. The property has been with the mortgagor, and at or within a few steps of its former *situs* ever since the sale. The purchaser has done no act in regard to it, that the mortgagor had not a full right to do. What wrong then has been done? What injury or damage suffered?

V. The sheriff did not give notice that he sold subject to the mortgage. If he had done so, would he have been less a wrong-doer? He had no right to judge whether the mortgage was valid—whether it was *bona fide*—whether paid or unpaid. It was enough that he had the right to levy, sell, and give possession. Ought he to have given notice that he sold subject to the mortgage, provided it was valid? Whether he gave such notice or not, all knew that he did so sell, and the mortgagee was not damaged, much less injured by such an unusual notice not being given. The levy is as much a trespass on the mortgagee's rights with the notice as without.

VI. If any one has a right to complain that the notice was not given, that the property was sold subject to the mortgage, it is the purchaser. But he pretends to no ignorance, and if the mortgagor is to be believed, he can well afford to pay the mortgage, since the value of the property sold was from \$1600 to \$1700, and it does not appear to have been sold for more than enough to satisfy the execution.

VII. There is no evidence that the plaintiff was damaged, nor of any amount of damage, by the sale.

VIII. If the respondent has a right of action, that right accrued on the day of sale, and was independent of the time when money was payable by the terms of the mortgage. The demand upon the sheriff after the sale, and paying over the money, was a nullity, and created no right of action.

IX. The finding was contrary both to law and evidence, and ought to be set aside, and judgment entered for the appellant.

X. The mortgage provides that until default be made in the

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payment of the said sum of money, the mortgagor is to remain and continue in the "quiet and peaceable possession of the said goods and chattels, and in the full and free enjoyment of the same." This is a "trust for the use of the person making" the mortgage, and the statute declares it "void as against the creditors existing, or subsequent of such persons." (2 R. S. 135, § 1; *Spies v. Boyd*, 11th vol. Legal Observer, 54; *Griswold v. Sheldon*, 4 Coms. 581.) 1. This section is wholly independent of the subsequent provisions in Sec. 5 in the same title, and of the 1st section of Title 3, same chap., 7 (p. 137). 2. Under the Revised Statutes the distinction between an absolute sale and a mortgage of goods was abolished. A mortgagee acquires the same right to the immediate possession as the vendee in the case of an absolute sale. Continued possession by the mortgagee is in derogation of the legal nature of the conveyance. (2 R. S. 136, Sec. 5; *Doane v. Eddy*, 16 Wend. 523; *Randall v. Cook*, 17 Wend. 53. 3. Where the possession is in derogation of the legal nature of the conveyance, the law presumes it may be by a secret consent or agreement of the parties, and pronounces it fraudulent and void, unless the good faith of the parties and absence of fraudulent intent is made to appear. The law will only sanction it as a privilege granted by the mortgagee or vendee founded on motives satisfactory to a jury, or where the situation of the property forbids an actual taking of possession. But where on the face of the instrument by which the party places the legal title out of his own control and beyond the reach of his creditors, he retains to himself the right of possession and full and free enjoyment for a certain time, he creates a trust in the property for his own use, a right which the statute says he shall not have, and makes his act void. (*Goodrich v. Downs*, 6 Hill, 433.) 4. The right to possess and fully and freely enjoy personal property, necessarily gives the right to use it for its ordinary purposes and to enjoy its proceeds and benefits. The person exercising that right would not be accountable to the owner for any injury to or destruction of his property, except for its abuse. At the end of the term the property may be worn out or of comparatively little value. It is hard to see how this would differ in effect from conferring upon the party the right to sell and dispose of the property as his

own. (*Griswold v. Sheldon*, 4 Coms. 581; *Spies v. Boyd*, 11 Legal Observer, 54.)

XI. The plaintiff did not prove the absence of fraudulent intent by facts and circumstances so as to overcome the presumption of fraud which the law raises from the seller remaining in possession. (*Randall v. Parker*, 3 Sandford, 69.)

XII. Assuming that the mortgage is valid, the mortgagor having the right to the possession, the mortgagee's only action would be in the nature of case for an injury to the reversion. This would only lie for an injury or a destruction of the property. The sale could not impair or affect the right of the mortgagee; his mortgage, notwithstanding the sale, remained a lien on the property in the hands of the purchaser, and he could take it from the purchaser when his mortgage became due in the same manner as he could from the mortgagor. (*Bank of Lansinburgh v. Crary*, 1 Barb. S. C. 542; *Hurd v. West*, 7 Cow. 752; *Gordon v. Harper*, 7 T. R. 9; *Van Antwerp v. Newman*, 2 Cow.; *Jackson v. Parker*, 1 M. and S. 234; 2 Saund. R. 47 (d.) (f.) and cases cited.)

XIII. The demand on the sheriff of the goods, and his neglect to deliver them after he had rightfully parted with the possession, did not show any conversion by him or render him liable. The law makes it his duty to take the goods into his possession and deliver them to the purchaser. As well might they in this case have demanded the goods of the mortgagor and sued him for a conversion.

XIV. There must be a demand of both defendants, and there is no proof that any demand was ever made of the defendant Colton. (*Mitchell v. Williams & Roberts*, 4 Hill, 13.)

D. D. Field, for the plaintiff, in support of the affirmance of the judgment, insisted upon the following points and authorities.

I. A *bona fide* mortgage of chattels, duly executed and filed, passes the legal title to such chattels to the mortgagee (Sto. on Bail., secs. 287, 288, and cases there cited). In respect to title, the Statutes of this State have abolished all distinction between absolute sales and mortgages of chattels (*Randall v. Cook*, 17

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Wen. 523). It matters not that a mortgagor continues in possession of chattels mortgaged, or that he has a right to hold such chattels for a definite period. He is simply a bailee until the condition of the mortgage has been complied with (*Fuller v. Acker*, 1 Hill, 473 ; *Rogers v. Traders' Ins. Co.*, 6 Paige, 583).

II. The interest of a mortgagor, in such case, is a limited, prescribed interest. His use, appropriation and possession of such chattels are limited and prescribed (*Smith v. Acker*, 23 Wen. 653). A sale, any interference with the title of the mortgagee, any act inconsistent with such prescribed use on the part of mortgagor, would at once terminate his right to possession ; and at all times the interest of the mortgagee is one which the courts will protect (*Matteron v. Baucus*, 1 Com. 295 ; *Wheeler v. McFarland*, 10 Wen. 318 ; *Howland v. Willet*, 3 San. Sup. C. Rep. 607).

III. A stranger claiming under mortgagor, can hold no more than his limited and prescribed interest. A levy upon, and sale of mortgaged chattels, under execution against property of the mortgagor, is an unlawful interference with the interest of the mortgagee, for which he has a remedy against the officer (*Otis v. Wood*, 3 Wen. 500 ; *Bailey v. Barton*, 8 Wen. 339 [see 347] ; *Butler v. Miller*, 1 Com. 496).

IV. The duty of the sheriff is well established. He should discriminate. If he does more than is necessary, under his authority, he is a trespasser (*King v. Manning*, Comyn R. [619 marl. page] ; *Waddell v. Cook*, 2 Hill, 47 ; *Melville v. Brown*, 15 Mass. 82 ; *Burrall v. Acker*, 23 Wen. 609, &c.).

V. The principle governing in case of sales of partnership property, under execution against property of one partner, or of property held by tenants in common, or joint tenants under execution, against property of a single tenant, is equally applicable to the case of a sale of mortgaged chattels under execution against the property of the mortgagor (*White v. Phelps*, 12 N. H. 382).

VI. The sheriff, or officer, by levy upon and absolute sale of chattels mortgaged, assumes, personally, the payment and satisfaction of the mortgage.

BY THE COURT. DUEB, J.—A chattel mortgage in all cases

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vests the legal title in the mortgagee, and where, by the terms of the instrument, he has the immediate right of possession, the property cannot be rightfully levied on and sold under an execution against the mortgagor, even when the possession has not, in fact, been changed. In these cases the mortgagee is, in judgment of law, the absolute owner. The mortgagor a mere bailee at sufferance. (*Marsh v. Lawrence*, 4 Cow. 469; *Otis v. Wood*, 3 Wend. 500; and *McCracken v. Luce*, cited in the opinion of the court; *Bailey v. Burton*, 8 Wend. 346; *Mattison v. Baucus*, 1 Comst. 295.)

On the other hand, where the mortgagor is entitled to the possession for a definite period, the weight of authority seems to be, that his possessory interest is a proper object of levy and sale, and without meaning to commit ourselves by a positive opinion, we shall assume, for the purposes of this decision, that such is the law.

In this case, Michelin, the mortgagor, by an express clause in the mortgage, was to continue in the possession of the goods and chattels mortgaged, until a default in the payment of the principal debt, and it was during the period that he was thus entitled to the possession, that the levy and sale, which are the subject of the complaint, were made. The mortgage had previously, however, been filed, and the sheriff had also express notice of its existence and terms, and the question is, whether thus charged with notice constructive and actual, he has not rendered himself liable in the present action, by his proceeding to sell and deliver to the purchaser, the entire property as that of the debtor. If he is liable, the other defendant, the judgment creditor, under whose direction and authority he acted, must be equally so. If the claim and rights of the plaintiff as mortgagee have been disregarded and violated, they are jointly liable as wrong-doers.

The question as to the liability of the sheriff, we believe, has not arisen in any case, in all its circumstances, similar to the present, but it has arisen and been determined in several cases so strictly analogous, that, in principle, they are not distinguishable.

The leading case is *Wheeler v. McFarland*, 10 Wend. 320. The plaintiff had a lien for advances made by him to the judg-

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ment debtor on the property levied on by the sheriff, who had notice of the facts, but who, nevertheless, proceeded to take possession of, and advertise for sale, the whole of the property, as belonging absolutely to the debtor. The court held that by thus acting, he rendered himself liable as a trespasser *ab initio*, so as to entitle the plaintiff to a recovery against him in an action of replevin. It is true that the lien of the plaintiff in this case was created by a pledge, and not by a mortgage, but as the interest of a pledgor is just as liable to be sold under an execution as the qualified interest of a mortgagor (2 R. S., p. 366, s. 20), we cannot perceive that this distinction detracts at all from the weight of the decision, as a relevant authority.

So the interest of a debtor, as a joint owner or partner, may undoubtedly be sold under an execution against him, but if the sheriff, having notice, proceeds to sell the entire property, thus jointly held, as that of the debtor, it is settled by many decisions that he becomes immediately liable to the other joint owners or partners, who are entitled to recover against him in a suitable action, the property itself, or its value. (*Walsh v. Adams*, 3 Denio, 125; *Waddell v. Coit*, 2 Hill, 49; *Mellville v. Brown*, 15 Mass. 82; *White v. Phelps*, 12 N. H. R. 182; *Johnson v. Evans*, 7 Mann & G. 240.)

These decisions, as it seems to us, can only be explained and justified upon the ground that, whenever it is known to the sheriff, or he has reason to believe, that the interest of the judgment debtor in the property upon which he has levied, is special and limited, it is his duty to declare the fact, and by express words, confine the sale to such right, title and interest, as the debtor may really possess. It is this doctrine, therefore, that we must now consider as established, and so far from thinking that goods covered by a mortgage can be justly excepted from its operation, we are clearly of opinion that it is to the relation of mortgagor and mortgagee, that it applies with a peculiar force. A mortgagee of chattels is in all cases the real owner, and the mortgagor, when permitted to retain the possession, simply his bailee. (*Bancroft v. Jones*, 4 Comst. 509; *Fuller v. Acker*, 1 Hill, 473; *Rogers v. Traders' Ins. Co.* 6, p. 583.)

And, as we before intimated, we seriously doubt whether a

right of possession, which in its nature is strictly personal and incapable of transfer (for if a power of disposition is given to the mortgagor, the mortgage itself is fraudulent and void, 2 Comst. 581), is a proper subject of levy and sale, under an execution, at all. Where fraud cannot be justly imputed, we see no reason why the rights and interests of a mortgagee ought not to be as carefully protected as those of a pledgee; and consequently, if a sale of goods and chattels, covered by a mortgage, is allowable at all under an execution against the mortgagor, it is evident that it ought to be so conducted as not to defeat, or in any degree impair, the remedy of the mortgagee. It should, therefore, comprehend the entire property as a single lot, be limited to the right and interest of the defendant, and be expressly subject to all the terms and conditions of his prior conveyance.

It is said, that when the property levied upon is in the possession of the mortgagor, the sheriff is not bound to inquire and determine whether the mortgage is valid or not—in other words, he has a right to be silent, and cast the risk upon the purchaser. The reply is, that the duty of the sheriff to inquire and determine whether the defendant is an absolute owner, or has only a special and limited interest, is exactly the same, in the case of a mortgage as in that of a pledge or of a partnership—a pledge may be a cover for fraud, as well as a mortgage—the asserted partnership may not exist, or may not embrace the goods in question. The sheriff, however, in proclaiming the fact that a title is asserted by a third person, to which that of the defendant in the execution is subordinate, and in selling the property subject to this claim, determines nothing as to its validity—he merely pursues the course which the law judges to be necessary for the protection of rights and interests, which might otherwise be sacrificed or endangered; he cannot say that a mortgage duly filed is a valid security, but he cannot treat it as not existing. He has no right to say that it is invalid by selling the property which it embraces, as belonging absolutely to the judgment debtor—it is at his own peril that he thus conducts the sale. As embracing a denial of the title of the mortgagee, it is an invasion of his rights, for which the law gives him an appropriate remedy. When the mortgage is valid,

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the sheriff is as much a trespasser and wrong-doer as if the judgment debtor had no interest in the property at all.

There is no force in the objection that the property is still subject to the mortgage, and as such, may be even now seized and sold by the sheriff. In all cases where goods are wrongfully sold, the owner has an election to reclaim the property from the hands of the purchaser, or recover its value from the tortious vendor. If the sale made by the defendant was unlawful, we see no reason for denying this election to the plaintiff.

The result is, that the defendants must be answerable in damages to the full extent of the sum for which judgment has been rendered against them, unless the title of the plaintiff as mortgagee can be successfully impeached. If the mortgage, as has been contended, was upon its face fraudulent and void as against creditors, or was rendered so by the continued possession of the mortgagor, the property which it embraced was rightly sold under the execution, as belonging exclusively to the debtor. It is evident, from the fact that an indemnity was required and given, that it was upon the ground that the mortgage was wholly void, that the sale proceeded, and it is upon this ground alone that it can be justified. That the mortgage was founded upon a full and valuable consideration was clearly proved, and is not denied, but it is insisted that it was rendered void as against creditors by the provision which it contains, that until default in the payment of the moneys meant to be secured, the "mortgagor should remain and continue in the quiet and peaceable possession of the goods and chattels which it embraced, and in the full and free enjoyment of the same." The objection is founded upon the interpretation given by the counsel for the defendants to S. 1, Tit. 2, of the Statute of Frauds (2 R. S., p. 135), which declares that "every conveyance, transfer, or assignment of goods and chattels, in trust for the use of the person making the same, shall be void, as against his creditors existing or subsequent;" but the learned counsel, we think, greatly erred in assuming that the stipulation to which he objected created a trust in favor of the mortgagor, within the meaning of the statute. Such a construction may very reasonably be given to a provision which not merely gives to the mortgagor for a time the right of possession, but authorizes him

to deal with the property, during that period, as an absolute owner, nor have we any difficulty in assenting to the decisions in which, in such cases, this construction has been adopted (*Wood v. Lowry*, 17 Wend. 492; *Griswold v. Sheddon*, 4 Comst. 582; *Spies v. Boyd*, 11 Leg. Obs. 54). In such a case, it may be justly regarded as the established law. But when the provision is limited to the personal use and enjoyment of the property by the mortgagor, that it created no trust affecting the validity of the mortgage, was, in our judgment, expressly decided by the Court of Errors in *Smith v. Acker* (23 Wend. 653), and is a necessary inference from the opinions delivered in the Court of Appeals in the recent case of *Griswold v. Sheddon*.

The objection arising from the actual possession of the mortgagor will be disposed of in a few words. In this court it has uniformly been held that the continued possession of a mortgagor, when consistent with the terms of the mortgage, and limited to endure only until a default in payment, where the mortgage has been duly filed, is not even presumptive evidence of a fraudulent intent, nor are we aware that until the adoption of the Revised Statutes, it has ever been doubted that such was the established law, in this State, as well as in England. The immediate delivery of the possession is indeed essential to the validity of a pledge; and its omission, where there is an absolute sale, as inconsistent with the nature of the contract, may be justly held to raise a presumption of fraud. But the main object of a mortgage, as distinguished from a pledge, is to enable the debtor to retain the possession and enjoyment of the property, so long as he fulfils the conditions of the contract, and this is just as true of a mortgage of chattels as of lands, nor can we believe that the Revised Statutes meant to abolish so important and vital a distinction—we cannot believe that it was the intention of the Legislature, in effect, to convert every chattel mortgage into a pledge. As the danger of fraud is now effectually guarded against by requiring every such mortgage to be filed (Laws of 1833, chap. 299), we are not at all disposed to favor a doctrine which is not only clearly opposed to the general understanding of those engaged in business, but plainly repugnant to their interest and convenience.

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It is not necessary, however, to insist upon these views in the present case, nor to explain more fully the reasons which have led us to adopt them. Let it be admitted that the act of 1833, requiring a chattel mortgage to be filed, as notice to creditors and purchasers, has not repealed these provisions in the Revised Statutes, upon which the argument is founded (2 R. S., s. 5, p. 136), and that, according to the literal construction of those provisions which the Supreme Court has adopted, an immediate delivery of the property, followed by an actual and continual change of its possession, is just as necessary in the case of a mortgage as of an absolute sale. When there is no such change of possession, it is only a presumption of fraud that is raised, and this presumption, by the express words of the statute, may be repelled by evidence that the mortgage was made "in good faith, and without any intent to defraud creditors or purchaser." This question, it is now settled, is a question, not of law but of fact, and hence the finding of the judge, by whom alone this cause was tried, must have the same effect as that of a jury. He has decided, as a question of fact, that there was no fraudulent intent, and as the case is now before us solely upon exceptions of law, we are as much concluded by his decision as we should have been by the verdict of a jury.

The judgment at special term must therefore be affirmed with costs.

DOUGLAS v. MAYOR, &C., OF NEW YORK.

The plaintiff, in the year 1850, and for several years before, resided in a hired house in the City of New York, during the winter and spring, and at his country seat in the town of Flushing, Queens County, during the summer and autumn. In the winter of 1850, he was assessed in New York for a tax on his personal estate, and in the summer was assessed for a similar tax in Flushing, which he paid. He resisted the payment of the tax in New York, and filed his complaint to restrain its collection.

Held, that whether the domicile of the plaintiff was or was not at Flushing, he was a resident of New York, and liable to be taxed as such when the tax for

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city was assessed. Judgment at special term dismissing complaint affirmed, with costs.

(Before OAKLEY, Ch.J., DUKE and PAINE, JJ.)

March 10 ; March 26, 1853.

APPEAL from a judgment at Special Term, dismissing the complaint with costs.

The object of the complaint was to restrain the defendants from collecting, by warrant or otherwise, a tax, amounting to more than \$2,500, on the personal property of the plaintiff. The tax had been assessed upon him as a resident of the third ward of the city of New York, between the 1st of January and the 1st of April, in the year 1850, for his proportion of the taxes for that year, upon the valuation of his personal property at \$200,000. The complaint alleged that a warrant for the collection of the tax had been issued, and that to relieve his property from a sale under it, the plaintiff had given his check for \$2,502 41, the sum claimed to be due, and prayed as a part of the relief to which he was entitled, that the collection of the check might be restrained, and the check itself returned. The principal ground upon which the whole relief was demanded was, that the tax was illegal and void, the plaintiff when it was imposed being a resident not of the city of New York, but of the town of Flushing, in the county of Queens, in which town and county he alleged that for many years past, including the year 1850, he had been assessed for his personal property, and had paid the taxes assessed.

The answer of the defendants admitted the assessment for the tax, its amount, and the issuing of a warrant for its collection, as set forth in the complaint, but averred that at the time the assessment for the year 1850 was made, in and for the city and county of New York, and during the whole of that time, the plaintiff was a resident and taxable inhabitant of the city, and liable as such to be assessed and taxed therein. This was, therefore, the only issue made by the pleadings.

Before stating the proceedings and evidence upon this issue, it seems proper to advert briefly to the statutory provisions which have a bearing upon the question.

The 5th section in Tit. 2 of the Revised Statute relative to

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the assessment and collection of taxes, provides "that every person shall be assessed in the town or ward where he resides when the assessment is made, for all personal estate in his possession or under his control as trustee, guardian, executor, or administrator." And § 8 of the same title requires the assessment to be made between the first days of May and July in each year. The Legislature, by an act passed on the 25th of March, 1850, amended the fifth section as above quoted, by adding, "that in case any person possessed of such personal estate shall reside during any year in which taxes may be levied, in two or more counties or towns, his residence for the purposes and within the meaning of this section, shall be deemed and held to be in the county or town in which his principal business shall have been transacted" (Laws 1850, p. 142). The act "to amend the charter of the city," passed April 2, 1849, provides in § 22, that assessments for all taxes for the city and county shall thereafter be made between the first days of January and of April in each year; but the time for making such assessments in other counties, as defined by the General Act, has not been altered.

The action was tried as an equity case before Mr. Justice Duer, at a Special Term, in March, 1852. Upon the trial, the town clerk of the town of Flushing proved, that the plaintiff had been assessed in that town for his personal estate, and had paid the taxes thereon in the years 1849, 1850, and 1851; that he resided there when the assessments were made, and for several preceding years had lived there during the summer season.

The counsel for the plaintiff then called as a witness,

Robert Dinwiddie, who, being sworn and examined, testified that he was a merchant, and resided in the city of New York; that he had been acquainted with Wm. Douglas, the plaintiff, for eleven years last past, during which period he had collected his rents, interests, and dividends, and attended to all of his financial business. That the plaintiff did no business. That witness deposited in bank, to credit of plaintiff, all moneys collected. That witness advised with plaintiff from time to time about his

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business. For a number of years last past the plaintiff has gone to Flushing about the first week of May, and remained there until November. Plaintiff has a house at Flushing. Servants were left there during the winter. Plaintiff has some land at Flushing, close to the house. It is about eight years that he has been in the habit of spending his time during this part of the year at Flushing, always at the same house. Plaintiff is an unmarried man, and has never been married. From latter part of November to first week of May, he usually spends his time at No. 28, Park-place, in the city of New York. He has a house there; it belongs to his brother. He rents it from his brother George; he rents it for the year; there is no written lease. I have not been at his house in Flushing, when he was there.

On cross-examination by defendants' counsel, the witness testified that the plaintiff was about sixty years old. Before he procured this country seat at Flushing, he resided at No. 28, Park-place, New York. This was eight years ago, and before that time he resided at No. 28, Park-place, New York. He resided there ever since I knew him, before he went to Flushing. He employs servants, and keeps house there. He takes his servants with him to Flushing, and part of his furniture. He keeps a servant in the house in Park-place, to take care of it all summer. I understand that he never was engaged in any business. His bank account is kept in the Bank of New York. My office is in the Exchange Building. He keeps his check-book at his house. My office is not an office for Mr. Douglas's business. I deposit moneys to his credit, and keep the usual bank pass-book. I settle the account at the bank, and receive the checks, and return them to him. I keep books—not a cash book; I keep books for him, as if he kept them himself. I render him a statement at the end of the year. He does not inspect the books himself. He has paid me a stated salary. He owns real estate in the city of New York; some of it is rented, and some is vacant lots. He has bonds and mortgages and stocks. I have the bonds in my charge, and collect the interest. The stocks and mortgages he has in a box, which in the winter is at his house, and in summer he either takes down with him, or leaves it here. I attend to all

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his financial business. His fortune is principally invested in bonds and mortgages of property in this city, and real estate. He has money out at Flushing, on bond and mortgage, on a farm there for \$6,000. I have the bond; the interest is paid to me in this city. He has some lands at Flushing, near the house he occupies. He rents the house at Flushing the same way as the other from his brother George; I never saw a written lease of it. He has 20 or 30 acres of land there himself. I never heard of his raising vegetables for sale. I consult him from time to time; I see him as occasion requires. I never pay any of his bills for household expenses. He comes to my office frequently; he has no desk in my office, nor any place there under lock and key. He does not stay at Flushing altogether in the summer; he is sometimes elsewhere. He frequently travels in the summer; in the winter he generally stays here. In the summer he is absent for a day or a week. His absences are short; principally at Herkimer, the residence of his sister. I cannot tell how large the house is at Flushing; I saw it when building; it is of stone or brick. Servants are left in the house in the winter. I never saw any of his furniture go away from the house in Park-place. It looks bare in summer. The pictures are covered up, and not removed to Flushing, but remain at Park-place.

On being re-examined by the counsel for plaintiff, the witness says: I merely act for Mr. Douglas, as before stated; I was the book-keeper of the mercantile firm of George and John Laurie, and during all the time they continued in business, till 1st January, 1852. They then retired, and I and another gentleman succeeded them in business. I kept the books and papers of Mr. Douglas in the office of George and John Laurie, while they were in business, and in my own since. Mr. Douglas did not pay any part of the expense of that office at any time.

The testimony being ended, it was admitted, that if the plaintiff was a taxable inhabitant of the city, the assessment, and all the subsequent proceedings, were regular.

Among other questions argued by the counsel of the parties, when the testimony was closed, was, that of the jurisdiction of the court, which the counsel for the Corporation strongly denied.

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The judge, on the last day of the term, delivered his judgment as follows :

DUER, J.—The relief which is sought in this case is purely equitable, and it is therefore by the rules which courts of equity as such are bound to observe, that my decision must be governed.

Yielding to the authority of the decision of the Court of Errors, in the case of *The Mayor of Brooklyn v. Messerole* (26 Wend. 134, 140, per NELSON, C. J.), I am therefore constrained to dismiss the complaint for want of jurisdiction. That decision, in my judgment, established the principle that a court of equity has no power to review, and set aside as illegal, the proceedings of any subordinate tribunal of special and local jurisdiction, whether acting under a statute or the common law ; the illegality of such proceeding being in all cases a question purely of legal, and never of equitable cognizance. It is true that in *The Mayor of Brooklyn v. Messerole*, the illegality, which was the ground of complaint, was apparent on the face of the proceedings ; but the judgment of Chancellor KENT, in *More v. Smedley* (6 John. Ch. R. 28), the authority upon which Chief Justice NELSON, in his opinion in the Court of Errors, chiefly relied, is in point to show that the objection to the exercise of any jurisdiction applies, with equal force, when the illegality can only be established by a resort to extrinsic proof.

Upon the intricate question of domicile, which was so ably and learnedly discussed by the counsel, I shall intimate no opinion ; I have, in reality, no right to consider it, and for obvious reasons have been careful not to form any definite opinion in relation to it.

The complaint is dismissed with costs.

The plaintiff appealed from this judgment to the General Term. The Appeal (March 10, 1853) was now heard.

E. Sandford, for the plaintiff and appellant, insisted that the judgment at Special Term ought to be reversed and judgment be given for the plaintiff for the relief demanded by his complaint,

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and contended : That as the facts upon which the plaintiff relied, to establish his claim to be relieved from the payment of the tax in question, did not in any manner appear upon the face of the proceedings by which the defendants had created an apparent obligation to pay it, they constituted a proper ground for equitable relief, when there was a separate equity tribunal to administer that relief, on the ground that there was no adequate remedy at law. (*Mayor of Brooklyn v. Messerole*, 26 Wend. 134, 137; *Simpson v. Lord Howden*, 6 Myl. and Cr. 97; *Hamilton v. Cummins*, 1 John's Ch. R. 517; *Van Doren v. The Mayor, &c.*, 9 Paige, 388-9.) The case of *More v. Smedley*, he urged, had no application to the present case, as the act complained of there was a legislative act of a Board of Supervisors, in the exercise of a portion of the political power conferred upon them, and the proceedings were voidable, and not void. (J. 6, C. R. 28, 81.) And that at any rate the Code had abolished the distinction referred to, so far as it had previously existed, and it is no longer an answer to a claim for specific relief, that if the complainant would wait, and suffer the injury which he seeks to avert, he might have a claim to compensatory relief. He is not to be denied relief on the ground that if he goes farther and fares worse, the facts which he has exhibited to the court will entitle him to redress. If he can show any right to be relieved at all, he is entitled to the relief upon this complaint. The counsel then insisted that if the court had jurisdiction the title of the plaintiff to the relief which he asked could not reasonably be denied. He was certainly not liable to be taxed twice in one year. He was a taxable inhabitant of the County of Queens, duly assessed as such in the town of Flushing, and paid his taxes there. He was not a resident of the City of New York, nor liable to be assessed as such, nor to pay the tax in question. In discussing this question the learned counsel entered largely into a consideration of the law of domicil, alleging that by the authorities to which he referred the town of Flushing was shown to be the plaintiff's domicil, and that this fact being established fixed his residence there.

A. J. Willard, for the corporation.

I. The plaintiff has mistaken his remedy. 1. The present action is governed by the rules of equity, applicable to injunction bills. 2. The subject matter of the present action never could have sustained a bill in equity. The courts of equity could not review the proceedings of subordinate tribunals, acting under a statute authority—clothed with the exercise of political powers—whether such proceedings were void, or merely voidable. (*Moers v. Smedley*, 6 Johns. Ch. R. 28; *The Mayor, &c. v. Messerole*, 26 Wend. 134; *Van Doren v. The Mayor*, 9 Paige R. 388.) 3. The jurisdiction of these courts to set aside deeds and other instruments, conferring a colorable title merely, was based upon the idea of fraud, and is inapplicable to the present case. 4. The distinction as to evidence on the face of the instrument, and evidence extrinsic, was applicable exclusively to the latter class of cases. It has created exceptions against equity jurisdiction, proceeding on the idea that there existed no necessity for its exercise; but has never conferred or enlarged that jurisdiction. 5. The proper remedy for the plaintiff, if he was unjustly assessed, was, in the first instance, to make his objection before the assessors. (1 R. S. 393, § 23.) He may further appeal to the supervisors, who have power to grant relief. 6. If the plaintiff was not subject to taxation, the assessment of the tax was void, and all parties attempting to enforce it are trespassers. (*The Mayor, &c. v. Messerole*, 26 Wend. 134.)

II. The plaintiff was, at the time of the tax laid, a taxable inhabitant of the city of New York, and of the ward within which he was assessed; and the tax was properly laid. 1. The assessment was required to be laid between the 1st of January and the 1st of April. It must be intended that it was laid during the period. (Laws, 1849, p. 284, § 22.) 2. During this period of the year, the plaintiff resided in the city of New York. 3. Being a resident of New York at the time the assessment was laid, he was properly taxable there. (1 R. S., p. 389, § 5.) 4. The fact that he resided during a portion of the year at Flushing, does not divest his abode in New York of the character of a residence within the meaning of the Revised Statutes. (*Bartlett v. The Mayor, &c. N. Y.*—Opinion of Mason, J.)

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III. The residence contemplated by the statute, is that of the domicil of the person, if he is domiciled within the state. 1. A person may have two or more residences. (*Bartlett v. The Mayor, &c. N. Y.*) 2. So for certain minor purposes, such as conferring jurisdiction, he may have more than one domicil. (11 Pick. 410; 5 Vesey, 750.) 3. But as it regards the exercise of the privilege, and the discharge of the burdens incident to citizenship, he can have but a single domicil.

IV. The plaintiff's domicil was in the city of New York; which, coupled with residence at the period of making the assessment, made his liability to taxation there perfect. The city of New York was the original domicil of the plaintiff, and the evidence is not sufficient to show that it was changed.

The counsel also insisted that the act of March, 1850, was applicable to the case, and that it was proved by the testimony of the plaintiff's own witness, that his principal business was transacted in the city of New York. The city, therefore, by the terms of the act, was his residence for the purposes of taxation.

The counsel for the plaintiff, at the close of the argument, stated that his client was exceedingly desirous that the cause should be determined upon its merits, and would no doubt acquiesce in the decision of the court, if adverse to his claim, and that the counsel would so advise him.

The counsel for the Corporation then said, that with this understanding he would not insist upon the objections to the jurisdiction of the court.

March 26.—BY THE COURT. OAKLEY, Ch. J.—In compliance with the wishes of the plaintiff, as expressed by his counsel, and with the hope of putting an end to the controversy, we have considered, and shall decide this cause upon its merits, as they appear upon the pleadings and evidence.

Passing over the objection, then, to the jurisdiction of the court upon which alone the complaint was dismissed at special term, the main question, the liability of the plaintiff to be taxed as a resident of the city, it seems to us, is free from difficulty. It has, in effect, been already decided by this court, in the case of *Bartlett v. The City of New York* (5 Sand. S. C. R. 44),

if not by the judgment then pronounced, yet by the reasoning upon which the judgment was partly founded. The published opinion of the two distinguished judges by whom that case was determined, commands throughout our entire assent. In this case, as in that, the argument for the plaintiff rests entirely upon an erroneous construction of the word "resides," in the 5th section of the general act; a construction by which residence and domicile are made in effect equivalent and convertible terms. It may be quite true that a person can have but one domicile, but it is certain that he may have two residences, for such is the case with every man of fortune, who, like the plaintiff, has a town house and a country seat, in each of which he dwells at different seasons of the year, with the intention of making each his permanent abode for a limited period. (*Frost v. Brisbane*, 19 Wend. 11.) The residence of the plaintiff in 1850, and for several preceding years, was just as certainly in this city during the winter and spring, as in Flushing during the summer and autumn. He was, therefore, a resident of the city, liable to be taxed as such when the assessment was made, of which he complains, and as the regularity of the proceeding against him, if he was so liable, is not denied, he is bound to pay the tax large as it may seem, for the collection of which he suffered a warrant to be issued.

It may also be true, as was contended, that Flushing was the plaintiff's true and only domicile, although we should have great difficulty in so holding were it necessary to determine the question; but we are unable to see that this fact, if proved or conceded, has any bearing upon the argument. In most cases, when a person has two residences, one of them is also his domicile; but we apprehend that his residences, in the legal and statutory sense of the term, are just as distinct as if both, as might be the case (*In re Thompson*, 1 Wend. 45) were separated from his domicile.

It is not asserted or supposed that the plaintiff, or any other citizen, is liable to be taxed twice in the same year for the taxes of the year; but it only follows, not that his assessment in this city was unlawful, but that he ought not to have been afterwards assessed in Flushing. His assessment here between January and April was a legal bar to his assessment in Flush-

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ing between May and July ; and if he chose to submit to this assessment, and pay the tax demanded, he has himself only, or the advice which he received, to blame. The law imposed upon him no such necessity, and we cannot relieve him from the consequences of his voluntary act.

As the act of March, 1850, amending the 5th section of the general act, was not in force as law when the assessment in this case was made, we do not think that its provisions can, with propriety, be referred to, as sustaining the legality of the assessment. Had the act been in force, its application to this case might well be doubted. The plaintiff was not engaged in any gainful pursuit, and had therefore probably no place of business within the meaning of the law. His only business was to receive and spend an ample income.

The provisions of the act are, however, a legislative recognition of the fact that a taxable citizen may have two or more residences, and a declaration of the sense in which the word "resides" ought to be construed in the section amended, in its original form. Such a declaration we, indeed, think was unnecessary ; but had the question been in reality doubtful, we should probably have allowed it to decide our judgment.

Without adverting at all, however, to the Act of 1850, as a ground or motive for our decision, our conclusion from the pleadings and evidence is, that the plaintiff, as a resident of the city, was rightfully assessed for the tax, the payment of which he has resisted ; and, consequently, that he has no claim to the relief, or any part of the relief, which he seeks. The judgment at Special Term, dismissing his complaint, is therefore affirmed, with costs.

We are not to be understood as intimating any opinion as to our jurisdiction ; but it is not to be denied that the present union in this court of legal and equitable powers may have given a new aspect to the question.

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A bank-check, payable to the order of bills payable, as it cannot be passed by an endorsement, is, in judgment of law, payable to bearer.

It stands upon the same ground as a check payable to the order of a fictitious person.

The certifying of a check as "good," is not a mere declaration of an existing fact, but creates a new and binding obligation on the part of the bank.

The meaning is, not merely that the check was "good" when certified, but that it shall be "good" when presented for payment.

A certified check is, therefore, as truly an absolute unconditional promise to pay upon demand the sum which it specifies, as an ordinary bank-note; and *laches*, in making the demand, is no more imputable in the one case, than in the other.

Held, upon these grounds, that the plaintiffs, holders for value, were entitled to recover the sum advanced by them upon four checks, certified by the defendants, although payment was not demanded until two months after the checks were certified, and in the interval the maker had withdrawn, upon other checks, all his funds from the bank. Judgment for plaintiff accordingly.

(Before OAKLEY, Ch. J., DUNN and PARK, J.J.)

March 17, 1853; March 26.

THE action was brought to recover the amount of four checks certified by the defendants to be good.

The complaint stated that the plaintiffs were the holders and owners of four checks drawn by A. B. Tripler on the defendants. That one of the checks, dated 9th of April, 1850, was for the sum of \$800—another, dated 11th April, 1850, for the sum of \$1201.80—another, dated 16th April, 1850, for the sum of \$1662—and the last, dated 20th April, 1850, for the sum of \$735. That these checks were respectively certified by the defendants to be good and payable by them, and that Tripler had then sufficient funds deposited with the defendants to meet the same. That the plaintiffs afterwards on the 6th of June advanced to Tripler the sum of \$4000 on the said checks on the consideration that the sums were certified by the defendants to be good and payable by them, and that on the 7th of June they presented the said checks for payment to the defendants, who then refused, and have ever since refused, to pay the same.

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The answer admitted that the checks mentioned in the complaint, were, on the days they were respectively dated, at the request of Tripler, the maker, certified by the defendants to be good, and that Tripler had then funds in the bank sufficient to meet the same.

The defences set-up were that the usage of the banks in the City of New York, where all the parties transacted their business, is to certify checks as good, when good, in order to save the counting out and transferring of money from hand to hand, and to receive the checks so certified as cash on the next day, in the usual exchanges between the banks. That it is not the custom of the banks to certify checks for the purpose of remittance to other places but to issue certificates of deposit, certified checks being considered merely as temporary vouchers, but certificates of deposit as absolute liabilities of the banks for any length of time, and that of this usage and custom Tripler and the plaintiffs were fully aware. That contrary to usage none of the checks so certified for Tripler were presented to the defendants for payment until the 7th of June succeeding their respective dates.

That after the said checks were certified and before the same were presented for payment, the defendants paid out on other checks of Tripler all his money deposited in their bank, and that on the 7th day of June, and for several days prior, Tripler had failed in business and suspended payment.

The answer further alleged upon information and belief, that Tripler passed the checks to one Hotchkiss as security for or in satisfaction of a usurious loan, and that Hotchkiss well knew when he received the same that Tripler had then no funds in the bank to meet them.

That Hotchkiss on the 6th or 7th of June passed the checks to the plaintiffs, who are merchants trading and doing business in the City of New York, under the firm of S. & E. Willets, and who received the checks, not in good faith, nor in the way of their trade and business, but fraudulently and collusively, and without any present consideration therefor.

The reply took issue upon the defences set-up in the answer.

Upon these pleadings the cause was tried before the Chief Justice and a jury on the 20th of October, 1852.

Upon the trial, the counsel for the plaintiffs, to maintain and prove the issue on their part, read in evidence four certified bank checks, in the words and figures following:

- A. B. TRIPLER. "No. 1707."
"New York, April 20th, 1850."
"Phoenix Bank,
"Pay to the order of Bills payable, seven hundred and
thirty-five dollars.
"\$735. "A. B. TRIPLER."
- A. B. TRIPLER. "No. 1658."
"New York, April 11th, 1850."
"Phoenix Bank,
"Pay to the order of 1658, twelve hundred and one
rtr dollars.
"\$1,201rtr. "A. B. TRIPLER."
- A. B. TRIPLER. "No. 1688."
"New York, April 16th, 1850."
"Phoenix Bank,
"Pay to the order of Bills payable, thirteen hundred
and forty-two dollars. .
"\$1,342. "A. B. TRIPLER."
- A. B. TRIPLER. "No. 1654."
"New York, April 9, 1850."
"Phoenix Bank,
"Pay to the order of Bills payable, eight hundred
dollars.
"\$800. "A. B. TRIPLER."

The making and certifying of the said checks, their presentment on the seventh day of June, one thousand eight hundred and fifty, and non-payment, were all admitted.

The amount of said checks and interest (subject to correction by calculation) was admitted to be four thousand six hundred and sixty-two dollars and fifty-six cents.

And hereupon the counsel for the plaintiffs rested.

The counsel for the defendants thereupon moved to dismiss the complaint.

First, because a check certified by a teller is not binding on a bank, such act not being within the scope of a teller's authority.

Second, the checks were all payable to order of Bills payable, and were not negotiable, and did not pass by delivery, but by assignment only, and no assignment had been proved.

But his Honor the Chief Justice denied said motion to dismiss complaint, to which decision the counsel for the defendants excepted.

The counsel for the defendants then, to maintain and prove the issue on their part, called

Isaac G. Ogden, Jr. : who, having been duly sworn, testified as follows :—I was the paying teller of the defendants for eight years, terminating in the summer of one thousand eight hundred and fifty ; Tripler, the maker of these four checks, was a dealer with the bank ; I certified these checks, and at the times they were respectively certified, we had the funds therefor in bank.

The defendants offered to prove by this witness, the state of Tripler's account, after the checks were certified ; and plaintiff's counsel objects to same being shown, except by production of Tripler's checks, or the books of original entries.

The defendants thereupon produced the books of the bank, containing original entries of Tripler's checks.

Said witness further testified : Tripler, afterwards and before the checks were presented, drew out all the funds he had in bank ; his last check was drawn on the third day of June of one thousand eight hundred and fifty.

The counsel for the defendants then offered to prove by this witness, the mode of business of the defendants' teller and book-keeper in regard to certified checks, and to show how the mistake occurred in regard to these, but the counsel for the plaintiffs objected to such offer. The court sustained the objection, and the counsel for the defendants excepted to such decision.

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The counsel for the defendants then called

William B. Meeker, who, being duly sworn, testified as follows :—I was assistant book-keeper in the Phoenix Bank in the spring and summer of eighteen hundred and fifty, and as such kept A. B. Tripler's account; the books now produced and shown me, are the books of original entry of that account; the other book here produced, is the bank ledger, containing that account; between the twentieth day of April, one thousand eight hundred and fifty (the date of the last check now in question), and the seventh day of June following, the bank paid out on Tripler's checks, seventy-one thousand nine hundred and eight dollars and sixty-one cents, and there were deposited by him in that period seventy-one thousand seven hundred and sixty-eight dollars and twenty-two cents.

The counsel for the defendants then asked the witness what amount was paid out on Tripler's checks, and what amount deposited to his credit between the ninth day of April (the date of the first of the four checks), and the twentieth of same month (the date of the last).

The counsel for the plaintiffs objected to this question as irrelevant.

The court sustained the objection, and the counsel for the defendants excepted to the decision thereon.

The witness further proved that the seventh day of June, one thousand eight hundred and fifty, the date of the last item in said Tripler's account, there was to said Tripler's credit, a balance of seventeen dollars and five cents.

The counsel for the defendants then called

Stephen Willets, one of the plaintiffs, who, being duly affirmed, said :—I am one of the plaintiffs; we received the four checks in question from Jeremiah Hotchkiss on the 6th day of June, one thousand eight hundred and fifty; the money, I understood, was for Tripler; I advanced him four thousand dollars on these checks, and took them for security therefor; when we advanced the money we did not expect to use the checks any more than we would Phoenix Bank stock, had we loaned on that; the next day we went to Hotchkiss to get the

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money on another loan, not connected with this which he had from me; Hotchkiss then told us to draw these checks; we sent to deposit them, but the teller said we had better draw them; we presented them to the bank on the seventh day of June, but the bank would not pay them on that evening, and we went the next morning, and they put us off until they got out an injunction against us. The plaintiffs are crockery merchants in Water street. Mr. Hotchkiss is a money broker in Wall street; I think it was just near by three o'clock when Hotchkiss came after the money; there was no agreement as to interest; we should have returned him all over the four thousand dollars, after deducting the interest, if we had drawn the amount of the checks; we have no other securities for this loan besides these checks.

On examination by the plaintiff's counsel, being shown a check, the witness says:—This is the check we gave Hotchkiss for the money we loaned on the checks.

The same is produced and read, and is in the words and figures following, to wit:

MECHANICS BANK.

"New York, 6 Mo. 6, 1850.

"Cashier of the Mechanics Bank,

"Pay to J. Hotchkiss, or bearer, four thousand dollars.

"Dolls. 4,000.

"STEPHEN & EDMUND WILLETS."

The defendants' counsel then called

Nicholas G. Ogden, who, being duly sworn, testified:—I was the cashier of the Phoenix Bank in the spring and summer of one thousand eight hundred and fifty.

Question.—Had you any knowledge of these checks being certified by the teller?

The counsel for the plaintiffs objected to the question.

The court decided the question to be irrelevant.

The counsel for the defendants excepted to such decision.

And hereupon the parties rested.

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The counsel for the defendants then renewed his motion for dismissal of the complaint on the former grounds, and also on the following.

That the circumstances under which the plaintiffs took the checks, were sufficient to put them on inquiry, and that the facts proved, showed laches on their part, which in law prevented their recovery from the defendants.

That as Tripler could not recover from the bank, the plaintiffs could not, for they claimed title through Tripler at a period when he had none to transmit.

But the Chief Justice denied said motion.

And the defendants' counsel excepted to such decision.

The respective counsel then summed up the case to the jury.

The court charged the jury, that if they should find that the plaintiffs had taken the checks under circumstances which ought to have put them on inquiry, as prudent men, they could not recover; otherwise they would be entitled to their verdict.

The jury found for the plaintiffs, and their verdict was taken, subject to the opinion of the court on the points of law raised in the case, with liberty to the court to order a nonsuit to be entered. The case to be heard at the General Term.

E. S. Van Winkle, for the defendants, argued the case upon the following points and authorities.

I. A check, certified by a teller only, is not binding on a bank, such an act not being within the scope of the teller's authority. The cashier is the proper officer to perform such duties. (*Massey v. Eagle Bank*, 9 Metcalf Rep. 306; *Manhattan Co. v. Lydig*, 4 Johns. 377.) And usage to the contrary cannot control. (*Woodruff v. Merchants' Bank*, 23 Wend. 673.)

II. The checks not being payable to any person, or his order, or to bearer, but to the order of bills payable, are not negotiable. (*Brown v. Gilman*, 13 Mass. R. 158; *Douglas v. Wilkeson*, 6 Wend. 637.) They did not pass by delivery, but by assignment only, and no assignment has been proved; and even if the court holds that the purchase and delivery on 6th

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June is evidence of an assignment, which may have been by parol, yet it was an assignment of a mere chose in action, and subject to all equities. (*Covill v. The Tradesmen's Bank*, 1 Paige, 131; *Gay v. Gay*, 10 Paige, 369; *DeMott v. Starkey*, 3 Barb. Ch. 403; *O'Callaghan v. Sawyer*, 5 Johns. R. 118.) The checks, then, being at that day void in the hands of Tripler, the assignor, were void also in those of the plaintiffs, the assignees, although they may have paid full value therefor *bonâ fide*. (*Ellis v. Messervie*, 11 Paige, 467; *Aff'd Evans v. Ellis*, 5 Denio, 640.)

III. In this case there was no dispute about the facts attending the purchase of the checks. It was, therefore, a pure question of law whether the plaintiffs were guilty of laches, and the court erred in submitting it to the jury. (*Hall v. Suydam*, 6 Barb. Sup. Ct. R. 83; *Pangburn v. Bull*, 1 Wend. 345; *Masten v. Deyo*, 2 Wend. 424.)

IV. The plaintiff's conduct in buying the checks, constituted laches.

V. The court erred in excluding the testimony offered by the defendants. 1. As to the mode of business pursued by the defendants in regard to certified checks, and to show how the mistake occurred in regard to those in question. (3 Term R. 307.) 2. As to ignorance of the cashier of the bank of any such checks having been certified by the teller. 3. To show the amount paid out on Tripler's checks and deposited to his credit, between the ninth of April, the date of the first of the four checks, and the 20th of the same month, the date of the last.

VI. If either the first or second, or the third and fourth points of defendants are sustained, then there should be a nonsuit or dismissal of the complaint. If the fifth point only is sustained, in either branch, then there should be a new trial.

E. W. Stoughton, for plaintiffs, argued the points, and cited the authorities that follow.

I. The first ground taken, that it was not within the scope of a teller's authority to certify checks, is unsound. It is a part of that officer's duty so to do. But if it were not, the

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pleadings admit that the defendants certified the checks mentioned in the complaint, and consequently the question as to the authority of the teller was not within the issue.

II. The checks were negotiable without endorsement. One was payable to the order of 1658, the other three to the order of bills payable. The effect of so drawing them, was the same as if they had been drawn payable to bearer. (Story on Bills, § 56, and cases cited.)

III. The offers to show how the mistake, in paying out the money by the defendants on Tripler's checks, arose, and to show the amount deposited by him between the 9th and 20th days of April, were properly overruled.

IV. Whether the circumstances under which the plaintiffs took the checks ought to have put them on inquiry, and whether they had been guilty of laches, were questions of fact, properly submitted to, and correctly found by, the jury. (*Rothschild v. Corny*, 9 Barn. & Cress. 388; *Chitty on Bills*, 321, 322, 512; *Goodman v. Harvey*, 4 Adol. & Ellis, 870, 7 Term Reports, 430; *Hendricks v. Judah*, 1 John. Rep. 319; *Forman v. Haskins*, 2 Caine's Rep. 369.)

BY THE COURT. OAKLEY, Ch. J.—Whether the teller had any authority from the bank to certify the checks in suit, is not a question that we are called upon to consider under the pleadings, since the complaint avers, and the answer in terms admits, that the certifying of the checks was the act of the defendants.

The case, therefore, of *Massey v. The Eagle Bank* (9 Metc. 309) is not applicable, nor is it necessary now to say whether we should have followed that decision, had the question, as to the authority of the teller, been properly raised.

The objection that the checks were not negotiable, and, consequently, that the plaintiff being merely an assignee, took them subject to every defence to which they were liable when transferred to him, was much insisted upon in the argument; but we are satisfied that it is untenable.

One of the checks was payable to the order of 1658, the other three to the order of bills payable; and as the required order could not, in either case, possibly be given, the checks, unless

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transferable by delivery, were payable to no one, and were void upon their face. The law is well settled, that a draft payable to the order of a fictitious person, inasmuch as a title cannot be given by an endorsement, is, in judgment of law, payable to bearer. (*Vin. v. Lewis*, 3 Term R. 183; *Minot v. Gibson*, id. 281, S. C. 1 H. Black. 569, affirmed in the House of Lords.) And it seems to us quite manifest that in principle these decisions embrace the present case. At any rate, the bank, by certifying the checks as good, is estopped from denying that they were valid as drafts upon the funds of the maker, and, consequently, were payable to bearer. The giving of such a certificate, if otherwise construed, would be a positive fraud.

The only question, therefore, that remains to be considered, is, whether the facts that payment of the checks was not demanded until nearly two months after they were certified, and that in the meantime the maker had drawn all his funds from the bank, including those represented by the checks, constitute a valid defence?—for, if not, the plaintiffs are clearly entitled to our judgment.

The answer to the question evidently depends upon the construction to be given to the act of the proper officer of a bank in certifying a check. Is it a mere declaration of an existing fact? or does it create a new and binding obligation on the part of the bank? Is it simply a declaration that the maker had then funds in the bank corresponding with the amount of the check? or is it an appropriation of those funds to the credit of the check, and a promise that, upon demand, they shall be applied to its payment? If the former, the defendants are not liable. If the latter, they have no defence.

That the latter is the true legal interpretation of a certified check, we cannot doubt, since, upon any other construction, the act of certifying would be nugatory, or would operate as a fraud. It would be nugatory, if understood by all, as creating no obligation, on the part of the bank, to retain funds to meet the payment of the check. It would operate as a fraud, if generally understood as creating an obligation which the law would hold not to exist.

The sole and manifest object of the maker or holder of a

check, in requiring it to be certified, is to enable him to use it as money ; that is, to pass it to others with the same certainty of its acceptance, as affording the same security to a holder ; and the bank, in complying with the request, must know that such is its object.

It is, therefore, certain, that a bank, by certifying a check, means to give it a currency and value that would not otherwise belong to it ; and this additional value, it seems to us, can only be given by interpreting the certificate as an unconditional promise of payment, whenever payment shall be demanded ; otherwise, a certified check would be of no more use or value than an ordinary check, and would afford no greater security to a holder. The certificate is a useless form, unless it means, not merely that the check was good when certified, but that it will be good when presented for payment. This construction is, therefore, necessary to give effect to the apparent intention of the parties, and, at any rate, is necessary to prevent the check from being subsequently used as a means of deception and fraud.

We did not understand the counsel for the defendant as denying that a certified check imports an obligation on the part of the bank to retain sufficient funds of the maker to meet its payment, but this obligation, he contended, exists only for a limited period, and may, therefore, be wholly discharged by the laches of the holder in demanding payment.

When this demand is delayed, even for a few days, the counsel insisted, that the holder of the check takes upon himself the risk of a withdrawal of the funds which, had he acted with due diligence, would have been applied to its payment. Such is, indeed, the nature of the defence set up in the answer, in the distinction which it avers to exist between a certified check and a certificate of deposit ; but no evidence of the general usage and custom which the answer alleges as establishing this distinction, was given upon the trial, and, in the absence of such evidence, there is no ground of principle, it seems to us, upon which it can be maintained. We can perceive no reasons for restricting the obligation of the bank within the limits suggested, or any other, and, consequently, none for the imputation of laches to a holder.

Willets v. The Phoenix Bank.

The obligation of the bank is simple and unconditional to pay upon demand, and in all such cases the demand may be made whenever it suits the convenience of the party entitled to the stipulated payment.

When the business of a bank is properly conducted, it is not possible that it can sustain any loss or prejudice from this interpretation of its contract—the contract which it makes in certifying a check, and it is only where delay may be prejudicial that the want of due diligence may be legally imputed, and operate as a bar to a claim otherwise valid. When the business of the bank is properly conducted, it is the duty of the officer certifying the check to cause it to be immediately charged, as paid, in the account of the drawer, and when this is done, the sum thus charged will remain as a deposit in the bank to the credit of the check, and be for ever withdrawn from the control of the maker, except as a holder of the check. Such a deposit stands exactly upon the same ground as every other. The bank, instead of being prejudiced, is benefited by the delay of its owner in calling for its payment, and can with no more propriety impute laches to the unknown holder of the check than to a known holder of an ordinary deposit. The loss which the bank, in this case, by resisting the demand of the plaintiff, seeks to avoid, has resulted from the laches of the teller, in suffering Tripler, the maker of the checks, to withdraw the funds that were appropriated to their payment, but assuredly neither the laches of its own officer, nor the fraud of Tripler, can excuse the bank from a compliance with its own engagement. As we intimated upon the argument, there is, in reality, in good sense, no distinction, in the nature of the liability created, between a certified check and a note of the bank payable on demand. Each is intended to circulate as money—each is an absolute promise to pay a specific sum upon demand, and laches in making the demand is no more imputable in the one case than in the other. The only difference between them is, that the promise which in the note is expressed, in the check is implied.

The Supreme Court of Massachusetts, in the case of *Massey v. The Eagle Bank*, which was cited and much relied on by the counsel for the defendants, although they denied the au-

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thority of the teller to bind the bank, gave the same construction to a certified check as that which we now have explained and adopted. The learned judge who then delivered the opinion of the court said, that "unless the word 'good' carries with it a binding evidence of the fact that the money is in the bank to meet that particular check, and that it will be paid to the bearer at any time when presented, it is of no practical utility. It will amount to no more than this, viz. that at the moment of its first presentment the check was 'good,' but not that it will continue so two hours after, if not being offered other checks of the same drawer are presented to the amount of his deposit in the bank." (9 Metc. 311.)

We shall notice briefly the last ground upon which it was argued that the plaintiffs were not entitled to recover, namely, that the circumstances under which the checks were transferred to them, ought to have excited their suspicions, and led them to inquire, and were, therefore, sufficient to charge them with a knowledge of the facts, which, upon inquiry, they would have ascertained. Had they inquired, they would have ascertained that Tripler had withdrawn all his funds from the bank, and was guilty of a fraud in attempting to transfer checks which he ought to have returned or destroyed.

Assuming that the doctrine of constructive notice is applicable at all to the present case, and if applicable, that the question properly arose upon the evidence, it was in effect, and we think rightly, submitted to the jury, and was settled by their verdict. We cannot say that their verdict was against evidence.

The plaintiffs are entitled to judgment upon the verdict for the sum of \$4,000, which they advanced upon the checks, with interest and costs.

JOHN L. FRANCIA and others v. LEO DEL BANCO.

F. & Co. sold and delivered to D. 100 boxes of raisins at \$2 per box at 4 months credit for approved paper, and received in payment a bill of exchange drawn and endorsed by D., and accepted by a house in Philadelphia. D. alleging that

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the raisins were of inferior quality to the sample by which they had been sold, endeavored to rescind the contract, and gave a written notice to F. & Co. that payment of the acceptance would be resisted. The bill at its maturing was not presented to the acceptor for payment, and at the expiration of the term of credit, F. & Co. brought their action against D. for the price of the raisins so sold and delivered to him.

Held, that the action could not be maintained upon the original consideration, the debt created by the sale having been satisfied by the reception in payment of the bill of exchange, and that the question of D.'s liability as drawer and endorser could only be properly raised and determined in an action upon the bill itself.

(Before DURE and BOSWORTH, J.J.)

Feb. 17 & 18; April 30, 1853.

THIS was an appeal from a judgment entered at Special Term upon the report of a referee. The judgment was in favor of the plaintiffs for \$214.56.

The complaint set forth that the plaintiffs, trading under the name and firm of Francia & Co., sold and delivered to the defendant 100 boxes of raisins for which he promised to pay them the sum of \$200 in four months from the date of the purchase, and averring that although the term of credit had expired the said sum was still unpaid and owing to the plaintiffs, claimed judgment for the amount with interest.

The answer set up two defences. First: That the raisins were sold by sample, and when delivered were found not to correspond with the sample, but were of an inferior quality, unmerchantable, and of little or no value, and that as soon as the fact was discovered the defendant had offered to rescind the contract and return the boxes of raisins.

Second: That the defendant in payment for the raisins delivered to the plaintiffs a bill of exchange drawn by him on Eldridge & Co. of Philadelphia for the sum of \$200 payable to his own order four months after date, which bill, accepted by the drawees and endorsed by him, "was accepted and received by the plaintiffs as aforesaid." It was also averred that the bill had not been presented for payment at maturity, nor protested for non-payment.

The reply admitted that the raisins were sold by sample, but averred that those delivered agreed with, and were equal in quality to the sample exhibited. It also admitted that the

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plaintiffs had received the bill of exchange mentioned in the answer, and averred that they, the plaintiffs, "having received a written notice from the defendant that payment of the said bill would be resisted, and Eldridge & Co. having failed and become insolvent, did not cause the said bill to be presented for payment, and that the same was in their possession unpaid ready to be produced and cancelled," and insisted that the notice so given by the defendant released them from any obligation to present the bill for payment, or cause the same to be protested.

The testimony of the witnesses examined before the referee related chiefly to the quality and condition of the raisins delivered, but, as the decision of the court was not founded on this evidence, it is omitted. The plaintiffs' counsel produced before the referee the bill of exchange mentioned in the pleadings, and offered to cancel and deliver up the same.

The defendant proved, by the auctioneer who sold the raisins, that the sale was for approved paper, satisfactory to the seller. He also gave in evidence the following receipt:—

"New York, 7th May, 1850.

"Received from Leo Del Banco, his note, accepted by Levi Eldridge & Co., at Philadelphia, at 4 months, dated 3d May, 1850, for two hundred dollars, in full for bill of raisins, same date.

"FRANCIA & Co., per JAMES J. FOX."

It was also proved that the note mentioned in this receipt was the bill of exchange referred to in the pleadings. The authority of Fox to sign the receipt was not denied.

The Referee made the following report:—

"In pursuance of an order made in the above cause, whereby it was referred to me to hear and determine, and report thereon to this court, I do find and report as follows:—That about the 3d day of May, 1850, the plaintiffs sold and delivered to defendant, through Gerard & Betts, auctioneers, in the city of New York, 100 boxes of raisins, at two dollars per box; that said raisins were sold by sample, at a credit of four months, for paper satisfactory to the sellers; that the raisins, sold and deli-

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vered, were equal to samples ; that the plaintiffs, at the time of said sale, received from defendant, in compliance with the terms thereof, a draft drawn by defendant on, and accepted by, Levi Eldridge & Co., of Philadelphia, payable four months after date ; that before the maturity of said draft, and on or about the 10th day of May, 1850, the defendant gave notice to the plaintiffs that the same would not be paid ; and that the same never was presented by them to the acceptors, for payment ; that such draft was produced before me, by the counsel for the plaintiffs, who offered to deliver up the same.

"I do therefore report, and decide, as matter of law, that the taking of said draft did not extinguish the liability of defendant on the original consideration ; that, in consequence of notice from defendant that said draft would not be paid, the omission of the plaintiffs to present the same for payment did not make the draft their own, and its production and offer to deliver it up, on the trial, entitle the plaintiffs to recover on the original consideration.

"I therefore render judgment for the plaintiffs for \$200, with interest from Sept. 6, 1850, making \$214 56.

"Dated New York, Sept. 21, 1852.

• "L. HORT, Referee."

The cause was now heard upon exceptions to this report. The questions raised and argued upon the evidence, relative to the warranty, and its breach, are omitted.

S. Sanzay, for defendant.

The facts in this case show a special sale of 100 boxes of raisins on specific terms, namely, for "approved paper," and a full compliance with those terms by the defendant ; in other words, a contract fully performed. The defendant paid for the raisins by the delivery of his draft, accepted by Eldridge & Co. ; and the plaintiffs having accepted this paper as a payment, can no longer resort to the sale and delivery of the raisins as a cause of action. The liability of the defendant as a vendee being extinguished, the only remedy of the plaintiffs against him (if they have any) is as drawer and endorser of the ac-

cepted draft; and this can only be enforced in an action upon the paper itself. It is, however, clear that the defendant is discharged upon the bill by the omission to demand payment of the acceptor, and no sufficient excuse is shown or existed for not taking the necessary steps to charge the defendant as drawer and endorser. And it is so far from being proved that the acceptor had no effects, that he appears to have had the identical raisins, or their proceeds, in his hands. The decision of the referee should be reversed, and judgment ordered for defendant. Upon the point of the defendant's discharge as drawer, the counsel cited the following authorities, *Hill v. Heap*, D. & R. N. P. R. 59; *Chitty on Bills*, 8th ed., p. 486; *Dennis v. Morrice*, Esp. R. 185.

T. Tucker for plaintiffs.

The receiving by the plaintiffs of the bill of exchange did not extinguish their claim against the defendant to be paid for the raisins, since there was no special agreement that the bill should be accepted as an absolute payment. (*Tobey v. Barber*, 5 John. R. 68; *Porter v. Tulcott*, 1 Cowen R. 259; *New York State Bank v. Fletcher*, 5 Wend. 85; *Coles v. Sackett*, 1 Hill, 516; *Vail v. Foster*, 4 Comst. 312.) The written notice from the defendant that payment of the acceptance would be resisted, relieved the plaintiffs from any obligation of presenting it for payment. The object of the rule of law, which requires the holder to notify the drawer of a bill of its dishonor, is to protect the drawer, but has no application where the drawer cannot be prejudiced by the omission; and the same circumstances which are by law a waiver of the necessity of giving notice of non-payment, will dispense with the necessity of presentment. Here the defendant could not be prejudiced by the imputed neglect of the plaintiffs, since a presentment for payment to the acceptor, after notice that payment would be resisted, would have been useless. As he learned that payment would not be made, it was idle to give him notice that it had not been. As bearing upon the second point, the counsel cited *Rogers v. Stevenson*, 3 Term R. 213; *Brett v. Levett*, 13 East. 214, 1 Wend. R. 219; *Chitty on Bills*, 8th ed., pp. 373, 385, 390.

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BY THE COURT. DUEB, J.—The referee has found that the raisins sold by the plaintiffs to the defendant, corresponded in quality and condition with the sample exhibited, and we are not prepared to say that this finding is against the weight of evidence. Hence, if the breach of the warranty, implied in the sale, were the sole defence, the motion to set aside the report would necessarily be denied.

But this is not the only defence. The raisins were sold on a credit of four months, for approved paper, and the answer alleges, in substance, that the required payment was made by a bill of exchange drawn on and accepted by the house of Eldridge & Co., of Philadelphia, and endorsed by the defendant and received by plaintiffs, in satisfaction of the purchase, and these allegations are not only sustained by the proof, but, as not denied, are admitted by the reply.

Whether an existing debt is, in all cases, satisfied by the mere delivery to the creditor of the promissory note or acceptance of a third person, endorsed by the debtor, is a question which we deem it unnecessary to consider, and upon which the English cases and our own are not easy to be reconciled. But all the authorities agree that where such a note or bill, by the understanding and agreement of the parties, is transferred and received in payment of the debt, the prior liability of the debtor is extinguished, and it is only as an endorser that he can then be charged. We think that the pleadings and the evidence show that in this case such was the agreement of the parties.

It has been contended, however, that this objection is fully met by the allegations in the reply, and the proof upon the hearing before the referee, that the acceptors of the bill were insolvent when it reached its maturity, and that the defendant had previously given notice to the plaintiffs that its payment would be resisted. The facts thus alleged and proved, it was argued, released the plaintiffs from their obligation to demand payment of the acceptors, and by rendering the bill valueless, revived their original demand against the defendants.

To this reasoning, however, we cannot assent. It is not sustained by the cases to which we were referred, nor by any authorities that we have been able to discover. The mere insol-

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vency of an acceptor has never been admitted to excuse a regular demand of payment, and notice of protest, as necessary to charge an endorser; and whether such is the legal effect of the notice given by the defendant that payment of the bill would be resisted, is a question that we must decline to consider, since we are satisfied that it is only in a suit upon the bill itself that it can properly arise and be determined. It is possible that the defendant may still be liable as drawer and endorser, but we can perceive no ground for the assertion that his liability as a purchaser, which was extinguished by his transfer of the bill, has been revived by any subsequent act; such might have been the effect of the notice given by him, had it rendered the acceptance wholly void, by discharging Eldridge & Co. from the legal obligation which it created; but that such was its effect, has not been and cannot be pretended. It cannot, therefore, be said that the notice rendered the bill valueless. It diminished the probability of its payment at maturity, but had no effect whatever upon its value as a security. Had the acceptors continued solvent, the value of their acceptance was precisely the same after the notice as before.

We are, therefore, of opinion that the referee erred in holding that the taking of the draft, accepted by Eldridge & Co., did not extinguish the liability of the defendant for the original consideration, and that this liability, if extinguished, was revived by his subsequent conduct.

The report is therefore set aside, and the rule for a reference discharged. Costs to abide the event. The referee ought to have dismissed the complaint, but, according to a recent decision of the Court of Appeals, we have no power to dismiss it now. If the pleadings, however, remain as they are, it must necessarily be dismissed upon the trial.

DARBY and others v. PETTEE and another.

The defendants, merchants in New York, signed and delivered to an agent of the plaintiffs, merchants in Liverpool, the following order to be executed by them.

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"500 tons Scotch pig iron of the Glengarnock, Summerlee, Govan, Cambro, Calder, Dundyvan, Coltness, or Gartsherrie brands, to be purchased and shipped immediately at current rates and bargains made for freight as low as they can make it."

Held, that the order, although not addressed in writing, was rendered valid by its delivery to the agent and its acceptance by him.

Held also, that the order was a direction to the plaintiffs to purchase from others as agents, and not evidence of an agreement to purchase from them as owners. New trial granted for the purpose of ascertaining whether plaintiffs purchased the iron which they shipped under the order or furnished the same from their own stock.

(Before DUFF, CAMPBELL, and BOSWORTH, J.J.)

February 22 April 30, 1853.

THIS was an action to recover damages against the defendants for their breach of a contract relative to the sale and delivery to them of 500 tons of Scotch iron.

The complaint set forth that the plaintiffs, Francis Darby, Abraham Darby, and Alfred Darby, on the 1st of February, 1849, were and ever since have been, and now are partners in business established, and carrying on business in Liverpool, in that part of Great Britain, called England, under the name and firm of The Coalbrookdale Company, and that the said defendants, at and during the times aforesaid, were partners in business, trading and doing business in the city of New York, under the name and firm of Pettee and Mann; and that said defendants, on or about the said first day of February aforesaid, at the said city of New York, under their said *firm* name, made and signed an order or contract in writing, for certain goods and merchandise therein mentioned, and then and there delivered the same to Septimus Crookes, at the city of New York, then and there being the general agent and factor of said plaintiffs, to be by him forwarded to said plaintiffs for their execution and performance, which order or contract was and is in the words and figures following:

"500 tons No. 1 Scotch Pig Iron of the Glengarnock, Summerlee, Govan, Cambro, Calder, Dundyvan, Coltness, or Gartsherrie brands. Do not want Gartsherrie if it comes higher than the other brands. To be purchased and shipped immediately at current rates, and bargain made for freight as low

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as they can make it. Our object is to get the iron to this market as soon as possible, believing that the price of freights and iron will keep advancing for a time.

(Signed)

"PETTEE & MANN."

"Feb. 1, 1849. New York."

That the said Septimus Crookes, as such agent and factor of said plaintiffs, received said order or contract, and without delay and in due and reasonable course of communication, forwarded the same to the said plaintiffs at Liverpool aforesaid, by whom the same was there received on or about the twentieth day of the said month of February; and the said plaintiffs thereupon, in consideration of the said order and request of the said defendants, undertook to execute the same, and without delay, and in due and reasonable course of communication, advised the said defendants thereof in and by a certain written letter or contract in the words and figures following:

"New York, March 12, 1849.

"Messrs. PETTEE & MANN,

"New York:

"Dear Sirs,—Your order for 500 tons Pig Iron has been received in Liverpool, and entered at the following prices, say £3 7s. 6d. at Liverpool, but if shipped from the Clyde (which will be done if possible) the price will be £3 and 2s. 6d. charges. The brands will be 1st class, most likely Gartsherrie or Glengarnock. The C. B. Dale Refined Bars ordered with the above are entered at £3 and 2s. 6d. charges, which with the pigs are subject to the usual credit—4 months from date bill lading.

"Respectfully yours,

(Signed)

"SEPTIMUS CROOKES, Agt.

"C. B. DALE, Co."

Which said letter was received by the said defendants at the City of New York, on or about the day on which it bears date.

That the said plaintiffs, in consideration of said order of said defendants, and in performance of the same and of said under-

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taking of said plaintiffs to execute the same, did forward and ship from Liverpool aforesaid, to their said agent and factor at the City of New York, Septimus Crookes, for delivery to the said defendants, five hundred tons of No. 1 Scotch Pig Iron of the Glengarnock, Summerlee and Gartsherrie brands, in the quantities and by the ships, at the times following, that is to say: the said plaintiffs at Liverpool shipped, on or about the fourteenth day of March, in the year one thousand eight hundred and forty-nine, on board the ship "Blanchard," 155 tons of the "Glengarnock" brand, and the same arrived at the city of New York, on or about the ninth day of the month of May following; on or about the seventeenth day of the said month of March, on board of the ship "E. & E. Perkins," 101 tons of the "Glengarnock" brand, and 60 tons of the "Gartsherrie" brand, which arrived at the city of New York on or about the fifth day of the said month of May; and on or about the twenty-second day of said month of March, on board of the ship "Caleb Grimshaw," 186 tons of the "Summerlee" brand, which arrived at the city of New York on or about the ninth day of the said month of May.

That the said shipments and each of them were made by said plaintiffs as early after the receipt by them of said order of said defendants, as in the course of trade was reasonable and practicable, and that the bargains for the freight of said iron upon each of said shipments, were made by said plaintiffs as low as they could be made by them, and at reasonable and proper rates and prices.

That upon the arrival of said iron at the city of New York, the said agent and factor of said plaintiffs, and in their behalf, tendered and offered to deliver the same to said defendants, and particularly so tendered and offered in writing, and by the following letter:

"New York, May 11th, 1849.

"Messrs. PETTEE & MANN,

"New York:

"Dear Sirs,—The quantity of pig iron, say (500) Five Hundred Tons, ordered by you on the 1st February, from the Coalbrookdale Co., is now ready for delivery, of which

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please take due notice, as it is liable to be sent to the public stores.

"Yours respectfully,

(Signed)

"SEPTIMUS CROOKES."

Which said letter was sent to, and received by the said defendants, on or about the said day of its date.

That at the time of the receipt by the said plaintiffs, at Liverpool, of the said order of said defendants, the current rates of price, and the market value of the said iron of the description in and by said order required, at Liverpool aforesaid, was three pounds seven shillings and six-pence sterling, lawful money of the realm of Great Britain and Ireland, at and upon a credit of four months from the date of shipment; and that by the said order of said defendants, and the acceptance thereof by said plaintiffs, the said defendants bargained for, and bought of said plaintiffs, and said plaintiffs bargained and sold to said defendants, said five hundred tons of iron so required, in and by said order of said defendants, and so shipped by said plaintiffs at Liverpool, and forwarded to, and arriving at New York as aforesaid, and thereupon the said defendants undertook, and became and were liable to the said plaintiffs to accept said iron on its arrival as aforesaid, and to take and pay for the same at the rates and price last aforesaid.

That though the said plaintiffs tendered, and offered to deliver said iron to said defendants as aforesaid, yet the said defendants did not accept, or receive, or pay for the same, or any part thereof, but refused and neglected so to do, and expressly advised and informed the said agent and factor of said plaintiffs at the city of New York, that they would not accept, or receive, or pay for the said iron, or any part thereof.

That upon and after such neglect and refusal of said defendants, and such notice thereof to the said agent and factor of said plaintiffs, their said agent and factor in their behalf, gave express notice to said defendants, that he should sell said iron on account of said defendants, and charge any loss upon such sale, and all costs, charges and expenses concerning said iron and such sale thereof, to said defendants, and that he gave such notice both verbally and in and by a certain written letter, in the words and figures following :

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" New York, May 14th, 1849.

" Messrs, PETTEE & MANN,

" New York :

" Dear Sirs,—Referring to my note of the 11th inst., I have now to advise you that I shall place the five hundred tons of pig iron ordered by you from the Coalbrookdale Co., in the hands of a broker for immediate sale, at the market price ; and any loss that may occur on such sale I shall debit to your account, as well as all duties, freights, and expenses of cartage, storage, &c.

" Yours very respectfully,

(Signed)

" SEPTIMUS CROOKES,

" Per CHARLES CONGDON, Att'y."

Which said letter was delivered to, and received by said defendants, on or about the day on which it bears date.

That after giving such notice last aforesaid to said defendants, and on or about the eighteenth day of May, in the year one thousand eight hundred and forty-nine, said plaintiffs, by their said agent and factor, sold said quantity of said iron, received by said ship "Blanchard" as aforesaid, for account of said defendants, and that the net proceeds of said sale were the sum of one thousand eight hundred and thirty-five dollars and fifty-six cents, as shown by and upon schedule A, hereunto annexed ; that on or about the thirtieth day of the same month of May, the said plaintiffs, by their said agent and factor, sold said quantities of said iron, received by said ships "E. & E. Perkins" and "Caleb Grimshaw" respectively, for account of the said defendants, and that the net proceeds of said quantity of pig iron by said ship "Caleb Grimshaw," upon such sale, was the sum of one thousand eight hundred and forty-five dollars and fourteen cents, as shown by and upon schedule B, hereunto annexed ; and the net proceeds of said quantity of said iron by said ship "E. & E. Perkins," upon such sale, was the sum of one thousand seven hundred and sixty-seven dollars and sixty-three cents, as shown by and upon schedule C, hereunto annexed. That such sales, and each of them, were made in the ordinary and usual manner, according to the custom of the iron trade in the city of New York, and that the net proceeds of

said sales were the true market value of said iron in the city of New York at the time thereof, and that such sales were made as soon after the said refusal of said defendants to accept said iron as was reasonable or practicable, without a sacrifice of said iron by a forced sale thereof.

That the amounts due to the said plaintiffs from the said defendants, under their said contract for said iron, were as follows, that is to say: for said quantity by said ship "Blanchard," two thousand six hundred and sixteen dollars and twenty-nine cents, due on the fourteenth day of July, in the year one thousand eight hundred and forty-nine; for said quantity by said ship "E. & E. Perkins," two thousand seven hundred and seventeen dollars and thirty-two cents, due on the seventeenth day of the same month; for said quantity by said ship "Caleb Grimshaw," three thousand one hundred and thirty-nine dollars and twenty-six cents, of which the said defendants had notice; and that after the said sales of said iron by said plaintiffs for account of said defendants, and on or about the twentieth day of September, in the year one thousand eight hundred and forty-nine, said plaintiffs made up an account of the amount due said plaintiffs, and rendered the same to said defendants, and demanded payment thereof; that a copy of said account is hereto annexed, marked schedule D, and the same justly and truly states the amount due said plaintiffs on the twentieth day of September aforesaid, from said defendants, that is to say, the sum of three thousand and seventy-nine dollars and twenty-seven cents, and that said amount still remains wholly due and unpaid; wherefore said plaintiffs demand judgment against said defendants for the sum of three thousand and seventy-nine dollars and twenty-seven cents, with interest thereon from the twentieth day of September, in the year one thousand eight hundred and forty-nine.

It appeared from the schedules annexed that the balance due to the plaintiffs was the sum for which they demanded judgment.

The answer of the defendants took issue upon all the material allegations in the complaint, and denied that they had ever made any contract with the plaintiffs for the purchase of iron valid and effectual within the statute of frauds. The

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issues made, the pleadings were tried before Mr. Justice Sandford and a jury on the 22d February, 1852, and on the trial the witnesses on the part of the plaintiffs proved substantially all the material facts set forth in the complaint.

The following order in writing addressed by the agent Crookes to the plaintiffs was also given in evidence.

"The Coalbrookdale Co. will please purchase, and ship to my order, for account of Pettee & Mann, New York, 1000 tons No. 1 Scotch pig iron of the following brands: Glengarnock, Summerlee, Govan, Cambro, Calder, Dundyvan, Coltness, or Gartsherrie, the latter preferred, if at same price as other brands. To be purchased and shipped immediately, at current rates. The lowest possible rate of freight to be obtained. Shipments from the Clyde would be preferred. Invoice and bills lading to S. Crookes. Insurance will be made on this side.

(Signed)

"S. CROOKES."

This order was dated February 6, 1849, and Crookes, who was examined as a witness, stated that the insertion of 1000 instead of 500 tons was his mistake.

It did not appear from any of the testimony or evidence upon the trial whether the plaintiffs had purchased the iron which they shipped, after they received the order from their agent, or had furnished the same from a stock then belonging to them. The fact was left wholly uncertain.

The jury by consent found a verdict for the plaintiffs for \$3600, subject to the opinion of the court upon a case, with liberty to turn the same into a bill of exceptions, and to the court to dismiss the complaint. The verdict, if sustained, to be subject to adjustment.

W. M. Everts, for the plaintiffs, moved for judgment in their favor upon the verdict, and rested the motion upon the following points and authorities.

I. The plaintiffs proved their whole case, as stated in the complaint, and must have a recovery in accordance with the verdict, unless the complaint be demurrable.

II. The order of defendants of February 1st, 1849, and the notice of acceptance of the order and undertaking to execute it, in the plaintiffs' letter to defendants, of March 12, 1849, constitute a complete contract in writing, signed by the parties. It was a contract of bargain and sale of 500 tons of pig iron, at £3 7s. 6d. per ton at Liverpool, and was the ordinary case of contract, made by letter of proposal, on one part, and of undertaking, on the other part. (*Mactier v. Frith*, 6 Wend. 105; *Downer v. Thompson*, 6 Hill, 208; *Eliason v. Henshaw*, 4 Wheat. 225; *McCulloch v. The Eagle Insurance Company*, 1 Pick. 283; *Adams v. Lindsell*, 1 B. & Ald. 681; Long on Sales (Rand's Ed.), 183.

III. If the contract were of an agreement to purchase and ship on the part of plaintiffs, and of defendants to accept and pay for, the rule of damages and recovery would be precisely the same. The foreign factor, to purchase, buys in his own name, and upon his own credit; he has the possession and control of the property, and a lien for his advances and commissions.

IV. The absence of commissions, however, shows that the relation between plaintiffs and defendants was of vendors and vendees. The order of defendants, given under same date, to Bech & Kunhardt, was an employment on commission, to purchase and ship iron to defendants; the order to defendants was an absolute order of so much iron.

V. The tender, refusal, and notice of resale, entitled the plaintiffs to resell on defendants' account; the sale by brokers, the usual mode of selling iron in this market, fixes the plaintiffs' damages from the defendants' breach of contract. (*Crookes v. Moore*, 1 Sandf. Sup'r Ct. Rep. 297.)

VI. The defendants' evidence was inadmissible; a special purchase of the defendants at Glasgow is not proper evidence to contradict the market price at Liverpool, established by the plaintiffs' testimony. If admissible, it is ineffectual against the conclusive evidence that the prices charged the defendants by plaintiffs, were at or within the "current rates," on receipt of the defendants' order at Liverpool.

VII. The verdict should be adjusted at \$3,518.60, being the amount shown on schedule D, with the deductions mentioned

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afterwards in the bill, and interest from date of account rendered, to the date of verdict.

C. O'Connor, for the defendants, insisted that the complaint ought to be dismissed upon the following grounds.

I. The various papers, acts, and conversations spread over the case, cannot be misinterpreted, ingeniously dovetailed together, and the compound so construed as to create, by inference, an agreement on the part of the defendants, to purchase from the plaintiffs the iron in question. (a.) Such an inference would be directly contrary to the plain terms of the written evidence, and wholly unsupported by any just view of the facts proven. 1. The letter of acceptance from the plaintiffs' agent, dated March 12, 1849, does not intimate that they intended to supply the order from their own stock. 2. If such an inference could arise, the defendants never assented to this new proposal, and consequently there was no agreement. (*Mactier v. Frith*, 6 Wend. 103; *Tucker v. Wood*, 12 Johns. 191; *Bruce v. Pierson*, 3 Johns. 534.) (b.) The goods in question being of greater value than \$50, the want of a writing subscribed by the defendants, expressing a contract to purchase, and of any payment of the price or acceptance of the goods, is fatal to the claim in this aspect. (*Davis v. Shields*, 26 Wend. 360; *Parker v. Wilson*, 15 Wend. 360; *Cammeyer v. United G. Church*, 2 Sand. Ch. R. 248, 249.) (c.) The order is void by the statute of frauds, as an agreement to buy; because it contains no indication whatever, by which the intended seller could be ascertained. (Story on Sales, § 257; *Champion v. Plummer*, 4 Bos. & Pul. 252; *Laythoarp v. Bryant*, 2 Bingh. N. C. 736; 10 Bingh. 383; 2 B. & Cresw. 627; 5 B. & Cresw. 583; 13 Johns. 301.)

II. The order or contract on which this action is founded is not an agreement to purchase iron from the plaintiffs, but at most only an employment of the plaintiffs, or a proposal to employ them to purchase iron for and on account of the defendants.

III. An agent or factor to buy or sell for his principal cannot buy from or sell to himself; this is an universal principle.

(*Michoud v. Girod*, 4 Howard's U. S. R. 553 to 560; *Davous v. Fanning*, 2 Johns. Ch. R. 252, cited in 4 Howard, at p. 646; see cases of Agents, cited 4 Howard's U. S. R. 554; 1 Hoven-den on Frauds, p. 146, and the cases cited in Notes K. and L.; *Att'y Gen'l v. Cochran*, Wightwicke, 14; *Massey v. Davis*, 2 Vesey, jr., 320; Dunlap's Paley on Agency, p. 33, and notes: *Van Epps v. Van Epps*, 9 Paige, 241; *Hays v. Stone*, 7 Hill, 135; *S. C. in error*, 3 Denio, 580.)

IV. The order was widely and wilfully departed from, to the great prejudice of the defendants. 1. The goods were shipped to and in the name of the plaintiff's agent, instead of being shipped, as required by the order, to the defendants themselves, which delayed the defendants in making sales for fifty days. (Case, fol. 72; Smith's Merc. Law, 499, 500, ch. 12, § 3.) 2. The plaintiffs were unreasonably dilatory in making the shipments; they improperly mingled the goods intended for defendants with others in the shipments and freight accounts, and their charges are excessive.

By THE COURT. CAMPBELL, J.—The principal points raised and discussed on the argument, were these:—

I. That there was no evidence of a contract, or if there was evidence, the contract was void, not being in writing, and subscribed by the defendants.

II. That the order or contract was not an agreement to purchase iron of the plaintiffs, but only an employment of the plaintiffs to purchase iron for the defendants, and that it did not appear that the plaintiffs had made any such purchase, and therefore could not recover.

As to the first point, we are all of opinion that this is a legal and valid order, and binding upon the defendants. It was not necessary that it should be addressed. It was delivered to the agents of the plaintiffs. The case of *The Union Bank of Louisiana v. Coster* (1 Sand. S. C. R. 566, affirmed in Court of Appeals, 3d Coms. 205), is an authority that the absence of an address or designation in writing, of the party to whom a proposition of contract is made, does not render the contract void under the statute of frauds. This proposition and acceptance we deem sufficient.

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As to the second point: The defendants' order or proposition was for 500 tons of iron, &c., "to be purchased and shipped immediately, at current rates," and as showing how the agent, Crookes, himself understood the order, he says, in his letter to plaintiffs forwarding the order: "The Coalbrookdale Co. will please purchase and ship to my order, &c." The rule contended for by the defendants is well settled, that an agent or factor to buy or sell for his principal, cannot buy from or sell to himself. (——— v. *Girod*, 4 How. U. S. R. 553 to 560; *Heys v. Stone*, 7 Hill, 135, and same case in Court of Errors, 3 Denio, 580.)

It does not satisfactorily appear what the facts are, whether the plaintiffs purchased the iron, or furnished it from their own stock. If purchased, we think the fact should be made to appear, and if proved, the plaintiff would be entitled to recover. If, on the other hand, the iron was furnished from their own stock, the defendants would be entitled to a dismissal of the complaint.

Where an agent or factor sells to a purchaser from himself, it is not sufficient that it is made to appear that the prices paid or charged were the current rates in the market. The contract set up in such cases cannot be enforced, not because the principal has been injured, but because it is against public policy. In this case, on a careful examination, it will be found that the other 500 tons of iron, purchased by the defendants, and forwarded from Glasgow, and the evidence in reference to which was put in by the defendants, when difference in freight and commission are added, must have been within a small portion of the price charged for the iron in question. Conceding that the iron in question was furnished by the plaintiffs from their own stock, the defendants were not sufferers, as it appears from other evidence that the price charged was the current ruling price in the market. Still, in the view we take of the law, the plaintiffs are bound to show that they made the purchase of the iron in question, and were not themselves the sellers, and to enable them to give this evidence there must be a new trial. Costs to abide the event.

M'ARTHUR and another v. FRANCES BLOOM.

The defendant was sued as the maker of two promissory notes, and the only defence set up was coverture. It appeared that she was a native of Prussia, but had lived in New York for more than seven years; and during that time had carried on business in her maiden name, as a *feme sole*. It also appeared that her husband, to whom she had been married more than twenty years, had continued to live in Prussia, and by the law of that country could not leave the kingdom without the express permission of the government.

Held, that the defendant, under these circumstances, might justly be considered and treated as a *feme sole*, and that the plaintiffs were therefore entitled to judgment.

(Before OAKLEY, Ch. J., CAMPBELL and BOSWORTH, J.J.)

April 6; April 30, 1850.

THIS action was brought to recover judgment for two promissory notes, made by the defendant, payable to the plaintiff's order. The making of the notes was not denied, but the defendant, in her answer, set up that she was a married woman; and that at the time of the making of the notes, and at the time of putting in her answer, her husband was living. The cause was tried before Mr. Justice CAMPBELL and a jury, in January, 1853. On the trial, it appeared that the defendant was a native of Prussia; that she was married in that country over twenty years ago to a citizen of Prussia, named Argoe; that about seven years ago the defendant came to the United States, and took up her residence in New York, where she has passed under her maiden name, Frances Bloom; and in that name executed the notes in question. Argoe, the husband, still continues to live in Prussia; has never been in the United States; and it does not appear that he has ever had any intention of changing his residence. It also appeared that, by the laws of Prussia, no subject of that country can leave without a passport or permit from the government. Upon that state of facts the judge decided that the defendant must be considered and treated as a single woman; and he ordered a verdict for the plaintiff, subject to the opinion of the court. The verdict was rendered for \$630.48, the amount proved to be due upon the notes.

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J. G. M'Adam, for plaintiffs, moved for judgment upon the verdict. He cited 1 H. Black. R. 349; *Gregory v. Paul*, 15 Mass. 31; 2 Kent's Com. pp. 138, 155, 156.

W. H. Taggard for defendant.

BY THE COURT. CAMPBELL, J.—It would be difficult to distinguish this case from that of *Gregory v. Paul*, 15 Mass. 31, except in that case it appeared that the husband had deserted the wife in England, while in this case the reasons of the separation, and of the wife assuming her maiden name, do not appear.

There is in the case before us, however, another fact, which may be considered of importance. It is, that, by the laws of Prussia, a passport or permit is required, to enable a subject of that country to emigrate. It may be that such permit would not be given to the husband, and thus the case would be brought within the rule of many of the English cases, as well as the principle upon which the rule was founded. Thus, when the husband was an alien enemy residing abroad, the wife was always treated as a *fême sole*, because it might well be that he would not be permitted to come into the country where she resided. So, when the husband was transported, even though for a limited period, the wife was also treated as a *fême sole*, as the husband might not be permitted to return, or might be disposed never to return—even after his term of banishment had expired.

In such cases, it is said that it is greatly for the interest of the wife that she should be treated and considered as a *fême sole*, or otherwise she could neither sue nor be sued; could neither enforce her rights, nor obtain the credit which might be necessary, in order to enable her to make a support for herself. (See cases, *Gregory v. Paul*, 15 Mass. 31; 1 Bosanquet and Pullen, 357; 2 Espinasse, 554; *Robinson v. Reynolds*, 1 Aiken, 174.)

There must be judgment on the verdict rendered in this case:

FAGEN v. DAVISON.

FAGEN v. DAVISON.

In an action to recover damages for the breach of a contract, relative to the sale and exchange of lands, if the only defence set up in the answer is, that the premises were in fact encumbered by judgments, the defendant is not permitted to show that there were outstanding judgments, which, although not a real, were an apparent lien, rendering the title unsatisfactory, and justifying his refusal to accept it.

The judge, upon the trial of a cause, has no right to strike out the only defence made by the answer, and substitute another, which is distinct and inconsistent.

A title, which is required to be satisfactory to the party by whom it is to be received, means a title to which there is no reasonable objection, and with which the party ought to be satisfied. Such a title he is bound to accept.

When the complaint alleges that the defendant was requested, and refused, to convey, and the allegation is not denied by the answer, no proof of a demand of the deed is necessary to be given upon the trial.

When it is proved that the premises to be conveyed by the plaintiff were of less value than those to be conveyed to him by the defendant, this difference of value, together with the expense of examining the title, is the true measure of damages.

Special damage is only necessary to be averred, when it constitutes in part the cause of action.

(Before OAKLEY, Ch. J., CAMPBELL and BOSWORTH, J.J.)

April 6; April 30, 1853.

APPEAL, by defendant, from a judgment at special term, in favor of the plaintiff, for \$1,441.25.

The action was brought to recover damages for the breach of an agreement, relative to the sale and exchange of certain real estate in the city of New York.

The complaint averred that, on the 1st of April, 1851, the plaintiff and defendant entered into an agreement, in writing, under seal, and then set forth the agreement verbatim. The following are its substantial provisions:—The defendant agreed to sell and convey to the plaintiff a house and lot in the city of New York, known as No. 149 Fourth Avenue, for the price of \$7,500; to be free and clear of all encumbrances, except a certain mortgage for \$5,000 which the plaintiff agreed to assume. The balance of the price, \$2,500, the plaintiff agreed to pay, by conveying to the defendant four lots of ground in

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the city of New York, on N. W. corner of 41st street and the Ninth avenue, for the price of \$7,500, to be free and clear of all encumbrances; at the time of the delivery of the deed; at which time the defendant agreed to execute and deliver to the plaintiff a bond and mortgage on the lots so conveyed, conditioned for the payment, in one year, of \$5,000, with interest.

The deeds were to be warranty deeds, and were to be executed and delivered, together with possession of the premises, on or before the 15th of the same month.

"The title to be good and satisfactory to the party to receive the same."

The complaint then alleged that at the time of making the agreement, the plaintiff was and had continued to be the owner in fee of the lots which he agreed to convey, and that he had at all times been ready and willing, and had offered to perform the agreement on his part, but that the defendant had wholly neglected and refused to perform the same; and demanded judgment for \$2,500 as damages.

The answer of the defendant denied none of the allegations in the complaint, but averred upon information and belief, that the lots which the plaintiff agreed to convey were not, on the day appointed for the delivery of the deed, "free and clear of all and every incumbrance," but that there were several judgments outstanding of record against one John McDonald, a former owner of the lots, which were at that time a lien thereon. The reply took issue upon this defence.

Upon these pleadings the cause was brought to a trial before Mr. Justice Sandford, and a jury, on the 12th December, 1851. It was proved upon the trial that there were no judgments unsatisfied of record against John McDonald, from whom the plaintiff derived his title.

A witness, however, on the part of the defendant, swears, that the plaintiff, in a conversation with him about eight days after the agreement, had admitted, that there was a judgment against McDonald, unsatisfied of record.

The plaintiff proved that the house and lot No. 149 Fourth avenue was worth from \$1,500 to \$2,000 more than the lots which he had agreed to convey. To the decision of the judge admitting this evidence, the counsel for the defendant excepted.

The judge also admitted in evidence an abstract of the title of the plaintiff to the lots he was bound to convey, with the proper searches annexed thereto, and an affidavit of McDonald, the grantor of the plaintiff, that certain judgments against John McDonald, which it appeared from the searches were unsatisfied of record, were not against himself, but against some other person of the same name. It was proved that all these papers had been exhibited to the defendant before the commencement of the suit. The defendant's counsel excepted to the decision admitting them to be read in evidence. It was also proved, on the part of the plaintiff, that the defendant was not, and never had been, the owner of the house and lot which he had agreed to convey to the plaintiff.

When the testimony was closed, the counsel for the defendant requested the judge to charge the jury, 1. That there being no special damage alleged, the plaintiff could only recover under the general allegation of damage, the expense of his searches, and of preparing his papers. 2. That as there was no sufficient proof of a demand of a deed from the defendant, the plaintiff was not entitled to a verdict. Lastly, that the existence of judgments against John McDonald was an apparent lien, and that the defendant was, therefore, not bound to be satisfied with the plaintiff's title.

The judge charged the jury that the case turned upon the point whether or not the plaintiff's lands were encumbered when he tendered his deed to the defendant. The only incumbrances alleged are judgments against John McDonald. If there were any judgments outstanding against the John McDonald through whom the plaintiff derived his title, he cannot recover. If there were no outstanding judgments, the plaintiff is entitled to recover the amount of the difference in the value of the premises agreed to be exchanged, together with his costs and expense of preparing his papers, and abstract tendered.

The defendant's counsel excepted to this charge, and also to the omission of the judge to charge as requested.

The jury found a verdict for the plaintiff for \$1,250.

The motion for a new trial, upon the exceptions, was denied at special term, and judgment rendered upon the verdict.

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The exceptions were now argued upon an appeal from this judgment.

Newton, for the defendant, insisted that a new trial ought to be granted, and argued the following points.

I. The court erred in refusing to charge that a demand of a deed from defendant to plaintiff was not necessary. (*Fuller v. Hubbard*, 6 Cowen R. 14; *Sage v. Ranney*, 2 Wend. R. 532; *Connolly v. Pierce*, 7 Wend. R. 130.)

II. There were apparent liens upon the premises in the Seventh Avenue, rendering the title doubtful; and the defendant was not bound, according to the terms of the agreement, to be satisfied with the title; because one of the conditions particularly mentioned in the agreement between the parties, required "the title of the respective premises to be good and satisfactory to the party to receive the same." There is no rule of law that will oblige a party to be satisfied when it is one of the conditions of the agreement that it is optional with him to be satisfied or not.

III. The rule of damages, as laid down by the court, was incorrect. 1. There being no special damages alleged in the complaint, the plaintiff could only recover under the general allegation of damages, the expenses of his searches and preparing his papers. 2. The recovery should be limited to the actual injury sustained, without regard to the profits plaintiff might have made by a sale of the premises. (*Peters v. McKeon*, 4 Denio R. 546.)

IV. The court erred in allowing the affidavit annexed to the abstract to be read to the jury; the searches attached to the abstract, and not the abstract, were put in evidence by the defendant.

R. S. Emmet and *A. L. Robertson*, for plaintiffs, claimed the affirmance of the judgment upon the following grounds.

I. The defendant could not, on the trial, set up any other defence than that contained in his answer, to wit, actual incumbrances upon the land agreed to be conveyed by the

plaintiff, by judgment against John McDonald, a former owner.

II. The demand of a deed by the plaintiff, if necessary, was admitted by the failure of the defendant, to deny the allegations of it in the complaint (Code, § 168).

III. The defendant admits the title was good and satisfactory by not objecting, except as to judgments against Mr. McDonald, which issue was found against him by the jury.

IV. Even if the defendant could reject the title on the ground of an apparent incumbrance, he has placed his objection on the ground of an actual incumbrance, which has been found against him.

V. The rule of damages was correct, at least so far as the defendant is concerned. 1. This was an agreement not merely for the sale of lands, but for the exchange of them. 2. The evidence showed that the defendant had no title to the lands agreed to be conveyed by him, so that the plaintiff could not enforce specific performance (*Florence v. Thornhill*, 2 W. Bl. 1078; *Hopkins v. Grazebrook*, 6 B. & C. 31; *Robinson v. Hannan*, 1 Ex. 849; *Betner v. Brough*, 11 Penn. St. R. 127). 3. If the defendant could have given a title, and refused, he was also liable (*Driggs v. Dwight*, 17 Wend. 71).

VI. The damages given by the jury, under the rule laid down by the judge, were admissible under the pleadings. I. The loss of the difference in value to the plaintiff between the completion and the agreement, and its valuation, was a direct and immediate consequence of the latter, and need not have been stated, even in a declaration at common law. 2. Even consequential damages could be recovered under an allegation of general damages in such case (*Ward v. Smith*, 11 Price, 19). 3. The plaintiff could formerly have had the same relief in equity, and the principles applicable to pleadings in equity did not require an allegation in the bill of special damages to recover them in an issue of *quantum damnificatus*. 4. An allegation of such special damage cannot form part of a complaint. (a.) It is not part of the cause of action, which the complaint is to contain (Code, § 142, subd. 2); if so, it will be admitted, unless issue be taken on it by the answer (Code, § 168, s. 149), which was not permitted or required under the

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former system of pleading (*Robinson v. Merchant*, 7 Q. B. 918; *Wilby v. Elston*, 8 Man. Gr. & S. 142). (b.) If it form part of the cause of action, a defendant might confine his defence to taking issue on it alone. (c.) They may be recovered under the demand for relief (Code, § 142, subd. 3; § 275, 276).

VII. The whole abstract of title, with papers annexed, was properly in evidence. 1. It was called for by the defendant, who thereby made the whole evidence. 2. The introduction of the affidavit of McDonald was proper, to show that every reasonable mode had been adopted to inform the defendant as to the state of the title. 3. The whole abstract and papers were proper, to show that the declaration of Mr. Fagen, that there was an outstanding judgment, if ever made, was corrected by the contents of these papers.

BY THE COURT. OAKLEY, Ch. J.—The pleadings in this case furnish a full answer to nearly all the objections that have been raised on the part of the defendant.

The answer, by not controverting, admits all the material allegations in the complaint, and sets up as a sole defence that the judgments against McDonald were a subsisting lien upon the plaintiff's lots, on the day appointed for the exchange and delivery of the deeds. The answer, therefore, admits that but for this objection the title was satisfactory, and that if the objection were proved to be groundless, the refusal of the defendant to perform the agreement was without justification or excuse.

The defendant could not, therefore, be permitted upon the trial, nor can he now be permitted, to shift his ground, by saying that the judgments against one John McDonald, which the searches disclosed, although not a real were an apparent lien, which, as clouding the title and rendering it unsatisfactory, justified his refusal to accept it. Whether had this defence been set up in the answer it could have availed the defendant may well be doubted, but it is quite certain that it could not be admitted under the pleadings. The judge could not strike out the answer that had been put in and substitute another, nor make any addition to the answer by which a new and

entirely distinct issue would be raised ; and were it admitted that he might have carried the power of amendment to this extent, no application for its exercise was in fact made to him. His charge therefore to the jury, that the case turned wholly upon the question whether the plaintiff's lots were in fact encumbered when he offered to convey them, was entirely correct. It is the only charge that he could have given.

The assertion that the provision in the agreement that the title should be satisfactory to the party who was to receive it, gave to the defendant an absolute right to reject that which was tendered, scarcely requires an answer. We cannot give a construction to the agreement that, by enabling each party to rescind it at his pleasure, would have robbed it wholly of its obligatory character. We cannot say that there was no contract for the breach of which an action could be maintained. A title, satisfactory to the party to whom it is to be given, means a title to which there is no reasonable objection, and with which therefore the party to whom it is tendered ought to be satisfied. When such is its nature, so far from having a discretion to reject, he is bound to accept it.

The objection that there was no proof upon the trial of a demand of a deed from the defendant is untenable. As we read the case the fact was sufficiently proved, but in truth no such proof was necessary to be given. The complaint expressly alleges that the plaintiff requested the defendant to perform the agreement by conveying or causing to be conveyed the house and lot which he had agreed to convey, and that the defendant had refused to comply with the request. These allegations are not denied by the answer, and their truth is therefore admitted upon the record. In the actual state of the pleadings the plaintiff was not required to give any proof whatever in order to maintain his action. He had only to show the amount of the damages he had sustained, and to repel the evidence on the part of the defendant.

It only remains to say, that in our opinion the rule of damages laid down by the judge was entirely correct, and that the abstract of title, with all the papers annexed, under the circumstances and for the reasons stated by the plaintiff's counsel, was properly admitted in evidence. It is an erroneous suppo-

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sition that the plaintiff was not entitled to recover the whole damages that were given, because no special damage was alleged in the complaint. Special damage is only necessary to be averred where it constitutes in part the cause of action. In other words, where the right to maintain the action depends upon the fact that the damage has been sustained. (*Kendall v. Stone*, 1 Selden, 14. *Linden v. Graham*, 1 Duer, 670.)

All the exceptions that appear in the case being overruled, the judgment appealed from is affirmed with costs.

EDWARD BAGGOTT v. ANN BOULGER and MARGARET BOULGER,
Executrixes of J. Boulger, deceased, impleaded with Ann
C. BAGGOTT and Wm. B. GOULDING.

The objection, that there is an improper joinder of parties, when the facts appear on the face of the complaint, can only be taken by a demurrer. Code, §§ 144, 147, 148.

When a claim against an estate is not presented to the executrixes or administrators within the 6 months prescribed by the Revised Statutes, the only effect of the omission is to limit the recovery in a subsequent suit by the creditor to the amount of the assets in the hands of the executor or administrator at the time of the commencement of the suit, and to deprive the plaintiff of all right to recover costs. (2 R. S., p. 88, § 34.)

The right of action is only barred when the claim was presented, and having been disputed or rejected was neither referred nor prosecuted within 6 months thereafter. (2 R. S. ib. §§ 38, 39, 40, 42.)

Where an order is made by the surrogate for the payment of a sum of money by the administrator to a creditor or distributee, and the order upon appeal has been affirmed by the Supreme Court, the administrator is estopped by such affirmance from alleging any error or defect in the proceedings before the surrogate.

An order which concludes the administrator equally concludes his sureties.

An administration bond is more than a bond of indemnity; its breach gives an immediate right of action against the sureties.

An order of the surrogate directing the prosecution of the bond and declaring it to be assigned, is a sufficient assignment within the statute; the surrogate, not being a party to the bond, cannot assign it as an obligee.

The action upon the bond is, under the Code, properly brought in the name of the person for whose benefit its prosecution is directed. Judgment for plaintiff.

(Before OAKLEY, Ch. J., CAMPBELL and BOSWORTH, J.J.)

April 6; April 30, 1858.

Baggott v. Boulger.

THIS was an action upon a bond given by Ann C. Baggott with the defendant Goulding and J. Boulger, deceased as her sureties for the faithful administration by her of the personal estate of an intestate Joseph Baggott deceased. It was tried before the chief justice and a jury on the 13th of February, 1852.

The following are the material facts of the case as proved upon the trial.

On the 9th of July, 1838, Joseph Baggott departed this life, leaving Ann C. Baggott, his widow, and the plaintiff and eight other children him surviving. He left a large amount of personal property. On the 25th of July, 1838, letters of administration were granted by the surrogate of the county of New York, to his widow. To obtain these letters, she executed a bond, together with William R. Goulding and John Boulger, to the People of the State of New York, in the penal sum of \$10,000; conditioned that she should faithfully execute the trust, and also, should obey all orders of the surrogate of the county of New York, touching the administration of the estate committed to her. The amount of the inventory filed was \$24,164.70. The debts due and paid, were \$6,414.48.

On the 15th of September, 1845, the plaintiff presented his petition to the surrogate, praying that the administratrix might account, and that she be ordered to pay to him his distributive share. Thereupon, the surrogate made an order requiring the administratrix to appear before him, on the 20th of October, 1845, and render an account of her proceedings as such, and show cause why she should not pay to the petitioner the amount of his distributive share in said estate.

On the day appointed, the administratrix appeared and filed an account.

The parties in interest not being satisfied with such account, on the sixteenth of December, 1845, the surrogate referred the account to Nathan Skidmore as auditor, and directed said auditor to make a report of his proceedings and determination to the surrogate, at the surrogate's office, in the city of New York, on the sixth day of January then next, and appointing that day for the appearance of the parties, to be heard on the question of confirming such report, or for asking such other order as might be deemed proper.

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On the 26th March, 1846, the said Skidmore made his report, that the estate of deceased amounted to \$12,464.70, after payment of all debts and expenses, and that plaintiff was entitled to be paid \$1113. The testimony taken was annexed to said report.

On the 5th of May, 1846, the administratrix filed with the surrogate exceptions to the report of Mr. Skidmore.

On the 15th July, 1846, the surrogate made a decree thereon, and after modifying the said report, ordered that the said administratrix do pay the said Edward Baggott the sum of \$773.76, being the amount due to him, as one of the next of kin of said intestate, together with the expenses of said accounting \$19.90, and the costs of the applicant, which were taxed at \$92.19.

The administratrix appealed from said order to the Chancellor, on the 22d of July, 1846. The cause was heard upon said appeal, in the Supreme Court, and the order of the surrogate appealed from was affirmed with costs on the 13th of March, 1849. On the 7th day of May, 1849, the surrogate, in pursuance of said order of the Supreme Court, further ordered and decreed, that Ann C. Baggott, administratrix, pay Edward Baggott the sum of \$1248.43. A certificate of the amount of said decree was filed and docketed in the county clerk's office, on the 7th of May, 1849, and execution was issued thereon on the 8th June, 1849, against Ann C. Baggott, and returned unsatisfied.

On the 14th of May, 1850, the surrogate made an order assigning the bond to the plaintiff, for the purpose of being prosecuted, in pursuance of said assignment; this action was brought on the 30th day of Nov. 1850.

It was proved on the trial that a second administration bond in the penalty of \$—, dated 20th August, 1839, had been executed by the administratrix with the defendants Goulding and Joseph Outwell as her sureties.

The following is the order made by the surrogate for the assignment and prosecution of the bonds.

“At a Surrogate's Court, held at the City Hall, of the City of New York, on the fourteenth day of May, One Thousand Eight Hundred and Fifty.

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“Present, HON. ALEXANDER W. BRADFORD, Surrogate.

“EDWARD BAGGOTT, against ANN C. BAGGOTT, Administratrix of Jos. BAGGOTT, deceased.

“On reading and filing the petition of the above named Edward Baggott duly verified, setting forth the entry of the decree in the above court, on the seventh day of May, One Thousand Eight Hundred and Forty-nine; whereby the said Ann C. Baggott, as administratrix, &c., of Joseph Baggott, deceased, was ordered, adjudged, and decreed to pay to the said Edward Baggott, as one of the next of kin of said Joseph Baggott, deceased, the sum of twelve hundred and forty-eight dollars and forty-three cents, and also, the filing of a certificate or transcript thereof, under the hand and seal of the Surrogate of said County, in the office of the Clerk of the City and County of New York, on the same day, and the issuing of an execution thereon, to the Sheriff of the City and County of New York, on the eighth day of June, 1849; against the property, real and personal, of the said Ann C. Baggott, as administratrix, &c., as aforesaid; and the return of the said execution by the Sheriff of the City and County of New York, with his return thereon endorsed in substance, that the said Ann C. Baggott, administratrix, &c., as aforesaid, had no goods, chattels, or real estate, whereof to satisfy the said execution.

“On motion of George Carpenter of counsel for said Edward Baggott, it is ordered according to the statute in such case made and provided, that the bonds given by the said Ann C. Baggott, as administratrix of the estate of Joseph Baggott, deceased, on the 25th day of July, 1838, and on the 20th day of August, 1839, for the faithful execution of the trust reposed in her as such administratrix, &c., be and the same hereby are assigned to the said Edward Baggott, in whose favor said decree was made for the purpose of being prosecuted.

(Signed)

“A. W. BRADFORD, Surrogate.”

The order was admitted in evidence, subject to the objection of the defendants' counsel, that it could not operate as an assignment.

When the testimony was closed on the part of the plaintiff, the counsel for the defendants moved to dismiss the complaint,

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and excepted to the decision of the judge overruling the motion. The grounds of the motion are not necessary to be stated, as they involve the same questions that were argued at general term.

A verdict was rendered for the plaintiff, assessing his damages, by reason of the breach of the condition of the bond, at \$1,490.10. The verdict was taken, subject to the opinion of the court, upon a case to be heard at the general term. Either party to be at liberty to turn the case into a bill of exceptions.

E. Sandford, for the plaintiff, now moved for judgment on the verdict, and argued as follows :

I. The assignment of the bond, by the surrogate, was properly admitted. The objection taken, that it was not an assignment, but only an order, is incorrect in point of fact. It is both an order and an assignment. The statute requires the surrogate, on application, to assign the bond of the administrator to the person in whose favor such decree is made, for the purpose of prosecuting it, but prescribes no form of transfer. (Laws of 1837, p. 535, § 65; *Bradley v. Root*, 5 Paige, 632; *Thigpen v. Harnes*, 1 Iredell's Ch. R. 20.)

II. The notice to dismiss the complaint was properly overruled. 1. There was no misjoinder of causes of action or of parties. Neither the administratrix nor the surety, referred to in the objection, was summoned in the action, nor did either appear therein. The plaintiff was entitled to amend the summons and title of the action, by striking out their names. As the persons objected to were not before the court, no foundation for this objection existed. If any objection could be taken by the defendants at the trial, the only proper objection was, that the cause was not in readiness for trial. The defendants should have demurred, if the objection existed. (Code, § 144, sub. 5; *Id.* §§ 172, 173.) 2. The proceedings before the surrogate were within the jurisdiction of that officer, the administratrix was duly cited to appear, and actually appeared before him, in all the proceedings, and his orders or decrees made thereupon against her, were legal and binding upon her and her sureties. (a.) The surrogate's courts are at all times open for the hearing

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of any matters within the jurisdiction thereof. (2 R. S. 221, § 2.) No record of adjournments is required to be kept, nor is there any roll of the proceedings upon which entries of continuances can be made. The jurisdiction being shown, every proper requisite to the act of jurisdiction is to be presumed as a conclusion of law. (*The Philadelphia and Trenton R. R. v. Stimpson*, 14 Peters, 448, 458; *Gignou's Lessee v. Astor*, 2 How. S. C. R. 319, 339; *Corwin v. Lowry*, 7 How. 172, 181.) (b.) The surrogate had jurisdiction of the subject matter of compelling the administratrix to render an account, upon the application of one of the next of kin, and had jurisdiction of the person of the administratrix, by the issuing and service of his citation, and by her appearance thereupon, and rendering her account. Upon this, the surrogate acquired jurisdiction immediately to decree the payment and distribution of the share of the petitioner by the administratrix. (2 R. S. 92, § 52, 53, 54; Id. 95, § 71; Id. 96, § 82; *Gignou's Lessee v. Astor*, 2 How. 319, 338.) (c.) Having thus jurisdiction, if the surrogate decided against the administratrix without any evidence, or upon any evidence received by him, which was not legally competent, or without legal authority, directed Mr. Skidmore to take such evidence as the parties should think it proper to offer, and he to receive, and to report such evidence with his opinion thereon, and then decided upon such evidence and report; such acts would be merely errors, for which the decree of the surrogate might be reversed upon appeal. The order having been affirmed on appeal, cannot be impeached in this collateral manner by any such alleged errors. (*United States v. Annedouds*, 6 Peters, 691, 729; *Thompson v. Tobruie*, 2 Peters, 157, 168; *The State of R. I. v. The Commonwealth of Massachusetts*, 12 Peters, 657, 718; *Ex parte Watkins*, 3 Peters, 193, 206, 7; *Voorhees v. The Bank of United States*, 10 Peters, 449, 473; *Gignou's Lessee v. Astor*, 2 How. 319, 339, 343.) (d.) The statute conferred express authority upon the surrogate to appoint one or more auditors to examine the accounts presented to him, and to make a report thereon, subject to his confirmation. (2 R. S. 94, § 64.) (e.) If the surrogate had not such authority, the papers produced show that the administratrix assented to it. She was present when it was made, and did not

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oppose. She attended personally, and by counsel, before the auditor. She agreed that the account settled in 1840 should be the substratum of that account, and that oaths to witnesses should be waived. She produced witnesses before the auditor. She excepted to his report, and thereupon obtained a further allowance of \$3,072.24. The sureties employed the counsel to prepare and argue these exceptions. (f.) The order of the surrogate, if unauthorized, did not deprive him of his jurisdiction. The accounts were referred to the auditor to make a report thereon to the surrogate's court, and appointed a time in that court for the appearance of the parties, and the decision of the questions arising upon the accounts. (g.) If the order were not authorized, the accounts remained before the surrogate for his judicial action. The parties agreed that he should base that action upon the evidence reported by Mr. Skidmore, and voluntarily appeared before him, and submitted the accounts thereupon to his decision. If the order had amounted to a discontinuance, a new citation could have been issued by the surrogate, and jurisdiction over the person of the administratrix have been gained thereby. The right to require such a citation was a personal privilege, which the administratrix waived by her appearance. The sureties concurred personally in this waiver. (*Kendall v. The U. S.*, 12 Peters, 524, 623; *Voorhees v. Bank of U. S.*, 10 Peters, 423.) (h.) The appeal from the decree of the surrogate was taken by the administratrix and her sureties. She asked that such decree might be made thereon as should be just, and the Supreme Court affirmed the surrogate's decree with costs, and remitted it to the surrogate to be carried into effect. In obedience to this judgment, the surrogate decreed the payment of the amount adjudged to be due from the administratrix to Edward Baggott, by the Supreme Court upon her appeal. He had jurisdiction to make that decree, and it is for the non-performance of that order that this action is brought. 3. The objections that the surrogate never fixed the security, and did not approve the bond, are not true in fact. He took the bond, and thereupon issued letters testamentary. The bond, on its production from the records of the surrogate's office, disproves these objections. (*Philadelphia and Trenton R. R. v. Stimpson*, 14 Peters, 448, 58; *People v. Falconer*, 2

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Sandf. R. 81, 83.) 4. The objection that letters were issued before the bond was executed, is not correct in fact. 5. The administratrix being bound by the decree, the sureties were also bound by it. Their undertaking was, that she should obey all orders made by the surrogate, touching the administration of the estate committed to her. (*Mann v. Eckford's Exrs.*, 15 Wend. 502, 510; *Willey v. Paulk*, 6 Conn. R. 74; *Jackson v. Griswold*, 4 Hill, 522, 32; *People v. Falconer*, 2 Sandf. R. 81, 84.) 6. The suit was properly brought in the name of the plaintiff. (Code, § 111.)

III. No defence was proved. There was no claim presented by the plaintiff to the executrixes, nor any disputing or rejection thereof, within the statute, so as to require a suit to be brought within six months thereafter. Here a suit was brought, and an answer put in, and it was then discovered that no order for prosecution of the bond had been in fact entered. It was thereupon discontinued, and the order obtained, and the present action was brought. (2 R. S. 88, 89, §§ 34 to 38.)

IV. Judgment should be given for the plaintiff for the amount of the damages assessed by the jury, for the breach of the condition of the bond \$1,490.10, with interest thereon, from the 13th of February, 1852, and costs of suit.

J. Van Buren, contra, insisted that the action could not be maintained, and that the complaint ought to have been dismissed, upon the following grounds.

I. This action, upon an administration bond alleged to have been executed by the defendants, Ann C. Baggott (as principal), and William R. Goulding and John Boulger (in his lifetime) as sureties, brought jointly against the principal and one of the sureties, and the executrixes of the other, praying judgment personally against all the defendants, cannot be maintained. (2 Burr. 1190; *Grant v. Shuster*, 1 Wend. 148; Code, § 143; *Alga v. Scoville & Co.*, 6 How. Pr. R. 131.)

II. Nor can it be maintained, because not instituted within the time required by 2 R. S. 89, § 38. The notice to creditors was first published 20–21 October, 1848, requiring the presentation of claims by the 24th of April, 1849. The surrogate's

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decree, which constitutes the cause of action, was entered May 7, 1849. The claim upon it was presented by the present claimant (by suit) June 27, 1849, and disputed (by answer); this suit was subsequently instituted November 30, 1850.

III. The decree of the surrogate was void. 1st. It was founded upon the report of Walter Skidmore, auditor, on an accounting, which was not a final accounting. (*Bronson v. Ward*, 3 Paige, 189; *Stone v. Morgan*, 10 Paige, 615.) The surrogate had no authority to appoint an auditor, except upon a final accounting. (2 R. S. 92; 2 R. S. 320, § 1, sub. 3.) His court being one of special and limited jurisdiction, his action, except in the mode prescribed, was void. (*People v. Corties*, 1 Sand. Sup. C. R. 228, 247; *Corwin v. Merritt*, 3 Barb. S. C. R. 431; *Sharp v. Speir*, 4 Hill, 76; *McDonald v. Bunn*, 3 Denio, 45.) 2. The reference to an auditor, by the consent of the creditor and administratrix, was a discontinuance of the proceeding before the surrogate. (*Green v. Patchin*, 13 Wend. 292; *Bank of Monroe v. Winder*, 11 Paige, 533; *West v. Stanley*, 1 Hill, 69.) 3. The proceedings before the surrogate do not appear to have been adjourned from time to time. (2 R. S. 3 ed., 320.) 4. The proceedings do not show that the surrogate of the city and county of New York had jurisdiction to grant letters of administration upon the estate of Joseph Baggott, deceased.

IV. The sureties on the bond of administration were discharged from liability for the plaintiff's claim, because, pending the reference to the auditor, the remedy against the principal, in the legitimate mode, was suspended, and the rights of the sureties changed. (*Clark v. Niblo*, 6 Wend. 236; *Rathbone v. Warren*, 10 J. R. 592; *Bangs v. Strong*, 7 Hill, 250.)

V. The order of the surrogate of the 14th May, 1850, entered in his records, did not constitute the assignment of the bond contemplated by the statute. 1. It did not authorize the plaintiff to maintain a suit in his own name. (*Bos v. Seaman*, 2 Code R. 1.) 2. No written transfer was executed, nor was the bond delivered to the plaintiff. (Sess. Laws, 1837, §§ 63, 64, 65.)

BY THE COURT. BOSWORTH, J.—It is objected that the plain-

tiff has improperly joined in the action the surviving obligors and the personal representatives of their deceased co-obligor.

The facts on which the objection is based, appear upon the face of the complaint. If the objection supposed to exist is, that several causes of action are improperly united, the only mode by which advantage could be taken of it, was by demurrer. (Code, §§ 144, 147, and 148.) It was not so taken in this action.

The only effect of omitting to present to an executor or administrator, a claim against his testator or intestate, within the six months prescribed by § 34 of 2 R. S., p. 88, is to limit the recovery in a suit subsequently brought by such a creditor, to the amount of such assets as may be in the hands of the administrator or executor at the time such suit is commenced, and to deprive him of all right to recover costs. (2 R. S. 89, §§ 39, 40, and 41.)

The right of action is not barred where the claim was not presented at all, but only where it was presented and disputed, or rejected, and neither referred nor prosecuted within six months after being disputed or rejected. (§§ 38, 39, 40, and 42.)

The initiatory proceedings before the surrogate to compel Ann C. Baggott to appear and render an account, conformed to the statute. She appeared and presented her account, and such proceedings were had that he made a decree, directing her to pay, on account of the assets she had received, a certain sum to the plaintiff. She appealed to the Supreme Court, and that court affirmed the decree. The judgment of the Supreme Court remains in full force and effect, and the surrogate, in obedience to the mandate of that court, decreed she should pay the sum originally decreed to be paid, with interest and costs.

We have no doubt that she is concluded by the order appealed from, and its affirmance by the Supreme Court, and is now estopped from alleging any error or defect in the proceedings before the surrogate.

Whenever any order is made by a surrogate, in respect to the administration of an estate cognizable by him, which concludes the administrator, the sureties of the latter are also concluded by it.

This is more than a mere bond of indemnity. The condition

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of it is, that their principal "shall obey all orders of the surrogate of the city of New York, touching the administration of the estate committed to her." It is equivalent to a covenant to pay all judgments that may be recovered against her for a specified cause.

The making of the order for payment of a certain sum, and refusal to pay, or the recovery of a judgment and non-payment, give an immediate right of action, and the order or judgment concludes the surety or covenantor, until impeached and avoided for fraud. (*Chace v. Henman*, 8 Wend. 452; *Rockfeller v. Donnelly*, 8 Cowen, 628; *Jackson v. Griswold*, 4 Hill, 532; *People v. Falconer*, 2 Sand. S. C. R. 81.)

There is no attempt to impeach and avoid the surrogate's order for fraud. There is no attempt to impeach its intrinsic justice.

The objection, that the surrogate's order of May 14, 1850, did not constitute the assignment of the bond contemplated by the statute is, we think, untenable. The surrogate was not a party to the bond, and, in the nature of things, could not execute an assignment as an obligee.

He commonly acts by order, and this order, by its terms, "assigns" it, "for the purpose of being prosecuted." This is in substance and effect the only assignment contemplated by the statute.

Notwithstanding the assignment, he retains the custody of it, for the common benefit of all persons having claims against the estate. The assignment contemplated by the statute is in effect only the grant of a permission or authority to prosecute the bond.

We see no objection to the action being brought in the name of the plaintiff. It is a useless proceeding to bring it in the name of "the people, on the relation of Edward Baggott."

Whether sued in the name of the party for whose benefit it is ordered to be prosecuted, or in the name of the people, the same facts are to be stated, the same number of separate suits may be had, and the consequences are the same, in either case, to the sureties.

The common law rule, that an action on a bond must be brought in the name of the obligee, whoever may be the own-

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er, is abrogated by the Code. It must now be brought "in the name of the real party in interest." (Code, § 111; 2 R. S. 476; Title 5 of chap. 8, part 3; Code, § 471.)

The plaintiff is the real and only party in interest prosecuting the action. The Code says that he may sue in his own name.

If a defect, it is a defect of parties, the defect being not that his name appears as a party, but that the people are not named with him as the parties prosecuting "on his relation." This defect, if it be one, appears on the face of the complaint, and is not objected to by demurrer. (Code, § 144.)

We concur in the opinion that the plaintiff is entitled to a judgment on the verdict.

The claim not having been presented to the defendants, as required by § 34 of 2 R. S. 88, the plaintiff is not entitled to costs to be collected of the estate of John Boulger, dec'd, or from his executrixes personally. (2 R. S. 90, § 41; Code, § 317.)

A judgment will be entered in proper form for the amount of the verdict against Margaret Boulger and Ann Boulger, executrixes, &c.

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Section 31 in the title of Ejectment in the R. S. is one of those general provisions relating to actions concerning real property which apply to actions under the Code, according to the subject matter of the action, and without regard to its form (Code, § 455).

The provisions in the section, by their reasonable interpretation, apply to all cases where, from any cause, the title of the plaintiff has ceased to exist before the trial.

It is not necessary to file a supplemental answer to enable a defendant to avail himself of the defence which these provisions furnish.

Judgment for plaintiff, for damages for withholding possession, and against him for the recovery of possession.

(Before OAKLEY, Ch. J., CAMPBELL and BOSWORTH, J. J.)

April 11: April 30, 1853.

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THIS was an action to recover possession of an equal undivided tenth part of two houses and lots, in the city of New York, and was commenced on the 19th of May, 1851.

It was tried before Mr. Justice CAMPBELL, on the 28th January, 1853, by consent of the parties, without a jury.

The counsel for the plaintiff, to maintain the issue on his part, read in evidence the following stipulation, signed by the attorneys of the parties :

“ The parties hereto mutually agree to admit on the trial of this action, the following facts, subject to all legal exceptions to their relevancy and admissibility at the trial :

“ ‘ John Lang, of the city of New York, died March 17, 1836, having left a will duly executed, attested, and proven, of which, or of so much thereof as is material in this action, a copy is hereunto annexed, marked A.

“ ‘ On or before the first day of May, 1851, George S. Puffer, as the agent of Edward Harris, surviving executor of John Lang, deceased, and of the heirs at law of the testator (the plaintiff and his sister, Sarah Lang, excepted), let to the defendant the premises described in the complaint (of which the said John Lang died seized), which he occupied as their tenant until the first day of May, 1852, when the said premises were sold and conveyed by the said Harris, executor, as aforesaid, to Wilhelm Ropke. Since which time, the defendant has continued, and now remains in possession thereof, as tenant of said Ropke.

“ ‘ Robert U. Lang, the plaintiff’s father, on the thirteenth day of June, 1836, by a paper writing, subscribed by him and delivered to the executors of the testator, admitted that he was indebted to the estate of the testator, in the sum of ten thousand dollars, for moneys advanced to him, and that he was to be charged that sum in the settlement of the estate of the testator.

“ ‘ At the time of the death of the testator, there were living, his widow, Sarah Lang, and seven children, namely : Hannah Gamble, Robert U. Lang, John Lang, junior, Sarah Lang (now Spencer), Charles E. Lang, William Lang, and Edmund Lang.

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“All of the children above named, excepting Edmund Lang, were of age at the time of the death of the testator.

“At the time of the publication of the codicil to the will (July 29, 1831), two of the children above named, to wit, William Lang and Edmund Lang, were under the age of twenty-one years.

“Edmund Lang became of age in the month of October, 1837.

“Robert U. Lang died intestate, July 10, 1837, leaving three children him surviving, viz. John Lang (since deceased), Sarah Lang, and Robert Lang.

“John Lang, junior, died August 7, 1836, intestate, and without issue.

“Charles E. Lang died July 9, 1848, intestate, and without issue.

“Sarah Lang, the widow of the testator, died in March, 1850.

“The estate of the testator consisted of some personal property, but chiefly of real, consisting of seven houses and lots, in the city of New York, of unequal value, so that no one house and lot could be given to any one child as his equal share.

“January 27, 1853.”

It is not deemed necessary to transcribe the copy of the will annexed to the stipulation, as all the material provisions of the will are set forth in the case of *Lang v. Ropke*, 5 Sand. S. C. R. 364.

The defendant's counsel objected to the admissibility and relevancy of the facts set forth in the stipulation, excepting the 2d and 3d paragraphs thereof. The court overruled the objection, and the defendant's counsel excepted.

The plaintiff's counsel, on his part, objected to the admissibility and relevancy of the facts set forth in the 2d and 3d paragraphs of the said stipulation. The court overruled the objection, and the plaintiff's counsel excepted.

The plaintiff's counsel hereupon rested his case; and the defendant's counsel moved to dismiss the complaint.

The judge stated, that without expressing any opinions upon the admissibility and relevancy of the facts set forth in the

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stipulation, or upon the questions of law involved in the case, and in the motion to dismiss the complaint, he would deny the motion, and leave the defendant to take an exception.

The defendant's counsel then and there excepted to such decision, and prayed the said judge to note such exception, and the same was noted accordingly.

The court then ordered judgment for the plaintiff, subject to the opinion of the court, on a case to be made by the plaintiff, and to be heard at the general term, in the first instance, without security, and the general term to give such judgment as should have been given at the special term, and with liberty to either party to turn the case into a bill of exceptions or special verdict.

W. C. Noyes, for the plaintiff, insisted that the provisions of the will were invalid, upon the same grounds that were relied on by the counsel for the plaintiff in *Lang v. Ropke*. He also contended that in some respects the case differed essentially from *Lang v. Ropke*. There the action was against a purchaser from the surviving trustee, and the court decided in favor of the purchaser upon the ground that the power of sale contained in the will was valid. Here the suit is against a lessee from the trustee, and the premises not having been sold before the suit was commenced, the question was whether the power of the trustee to lease continued fourteen years after the youngest child had attained his age. The facts of the sale to *Ropke* and of the defendant's holding under him, having occurred since the commencement of the suit, he contended could not be set up as a defence, no supplemental answer having been put in pursuant to the provisions of the Code, § 197 (*Jackson v. McCall*, 3 Cowen, 75.)

C. P. Kirkland, for the defendants, upon the principal questions, relied on *Lang v. Ropke* as a controlling authority. Even should the court hold that the trustee had no power to lease, and that the plaintiff had consequently a legal title as a tenant in common when the suit was commenced, yet, as before the trial, his title was divested by the sale to *Ropke*, he could not now be permitted to recover the possession; nor

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could any other judgment be given than that which the Rev. Stat. prescribed. (2 R. S., p. 308, § 31.) If the statute was applicable, a supplemental answer was unnecessary.

By THE COURT.—The main questions upon which this controversy turns, have been decided by this court in *Lang v. Ropke*, and as we see no reason to doubt the propriety of that decision, we shall certainly adhere to it. We must, therefore, hold that the provisions of the will created no undue suspense of the power of alienation; and that the power of sale, given to the executors and trustees, was valid as a power in trust, and was duly exercised by the sale to Ropke.

Although by the terms of the will, the whole real estate of the testator vested in the executors at the time of his decease, yet as they were only to hold it until the youngest child should attain his age, their title, as devisees in trust, having power as such to rent the property, wholly ceased when Edmund attained his age in 1839. Their power to sell was from that time a naked power in trust, wholly unconnected with any right of possession or control. The lease made to the defendant on the 1st of May, 1851, by the agent of the surviving executor, was therefore void as against the plaintiff, it being admitted that it was not made under any authority derived from him; nor can it be denied that when he commenced this suit, he had a clear right, as a tenant in common in fee, to recover the undivided share which he claims. But we hold it to be just as certain, that his title as owner, and consequent right to the possession, were wholly divested by the sale to Ropke; and as this sale was perfected before the trial, the only question is, whether the defendant could then avail himself of the defence which it created.

The Rev. Statutes provided exactly for the case, by declaring "that if the right or title of a plaintiff in ejectment expire after the commencement of the suit, but before trial, the verdict shall be returned according to the fact, and judgment shall be entered, that he recover his damages by reason of the withholding of the premises by the defendant to be assessed; and that as to the premises claimed, the defendant go thereof without day." (2 R. S. p. 308, § 31.) We are clearly of opinion that

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this is one of those general provisions which we are bound to apply to actions under the Code (Code, § 455), and that by its reasonable interpretation, it applies to all cases where the title upon which a plaintiff seeks to recover the possession of real property, has from any cause ceased to exist before the trial. It would be a narrow construction to confine it to cases in which the title expires by its own limitation. As under the former practice, a defendant could avail himself of the defence which the provision furnishes without a plea *puis darrein continuance*, we do not think that a supplemental answer ought now to be required. When the defence would operate as a surprise, the judge would doubtless deem it proper to postpone the trial.

A rule for judgment must be entered, in conformity to the statute. If the counsel shall have any difficulty in agreeing upon its terms, it will be settled by one of the judges at chambers.

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Facts, relied on as constituting a defence, must be set forth at least with so much certainty as to enable the court to say that, if true, the action is barred.

The Code has abolished technical rules of pleading, but has not abolished those which good sense prescribes, and are necessary to carry into effect its own provisions.

Hence, when an award is pleaded, that the court may judge of its validity as a bar, its substance, if not its terms, must be set forth.

Whether the section in the R. S., which relates to a revocation of the powers of arbitrators, is not confined to those arbitrations which the statute regulates? (2 R. S. p. 544, § 23.)

When neither a warranty nor a fraud in a sale is alleged, it is no defence that the goods were unsound and unmerchantable at the time of the sale.

Order allowing demurrer to answer, affirmed with costs.

(Before DUE & CAMPBELL, J.J.)

April 26 and 30, 1853.

APPEAL from an order, made by Mr. J. BOSWORTH, at special term, allowing a demurrer to the answer.

The action was brought by the plaintiffs as payees against

the defendant as the maker of a promissory note for \$2,782.88. The complaint was in the usual form, and demanded judgment for the amount of the note with interest.

The answer was in the following words:—

*“City and County of New York:—*Jonas S. Levy for answer says, that it was agreed between the plaintiffs and defendant, by their mutual bonds, made and delivered on the twenty-fifth of July, eighteen hundred and fifty-one, to submit all matters in controversy, relative to said note, to E. H. Gillilan and A. Wellington Hart, as arbitrators: that said matters were fully and finally submitted to said arbitrators (upon a hearing of both said parties) for their decision, and an award was made and published, and the same was given to this defendant on or about the — day of January, eighteen hundred and fifty-two, signed by each of said arbitrators, and by Joseph Stuart, as umpire, on the twenty-eighth day of August, eighteen hundred and fifty-one.

“And defendant further says: that the power of said arbitrators was not revoked prior to said final submission to them on the hearing.

“And for further answer said defendant says: That said note was given by the defendant for five hundred and thirty-six pieces of imitation sheetings, purchased by said defendant of said plaintiffs, at a full price, as sound and undamaged sheetings, and that said sheetings were sold to this defendant per sample, and for the purpose of being shipped to Mexico. And this defendant avers, that said goods went from the store and premises of the plaintiffs, and were shipped by them in New York, and the bills of lading therefor taken in their own names, and endorsed over to this defendant, said goods never having been in the possession of, or received or examined by said defendant previous to said shipment.

“And defendant avers, that upon the arriving of said goods in Vera Cruz, in said Mexico, said goods were found to be damaged and unsalable, and were not in the state represented by said plaintiffs.

“And this defendant avers, according to his information and belief, that said goods were unsound and unmerchantable at the time of sale, and while in the possession and ownership of

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said plaintiffs, and were not injured by damage of the sea, or in any way or manner, after they were sold to said defendant by said plaintiffs.

"And this defendant avers, that immediately upon ascertaining the state in which said goods were in Vera Cruz, this defendant gave immediate notice thereof to said plaintiffs; to which notice no answer was received from said plaintiffs; whereupon said defendant, for the benefit of all parties, had said goods valued by the proper officers in Mexico, and thereupon, for the benefit of all concerned, sold.

"And defendant says, that said goods brought the net price of fourteen hundred and six 31-100 dollars.

"And defendant thereupon avers, that he is not liable to pay said note, and that he is entitled to receive from said plaintiffs his costs and charges (for attending to and selling said goods), amounting to three hundred dollars."

A. S. Levy, for the defendant, the appellant.

I. It is only necessary that our answer should be in accordance with the intention and spirit of the Code, and its sufficiency is to be determined only by that Code. (Voorhies' Ed., Code, p. 135, sec. 140; Demurrer, Code, p. 152.) And we must forget all old rules with regard to demurrer. (3 Howard's Spe. Tr. Rep. p. 410; 3 Howard's Spe. Tr. Rep. p. 280.)

II. Our answer sets up not only as a fact, the agreement to submit all matters in controversy to Gillilan and Hart, but also the final submission, and an award under it, signed by both said arbitrators, and also by one Joseph Stuart. 1. It was too late to revoke and sue after final submission by statute. (2 R. S. p. 631, sec. 23; 5 Paige, 575; 11 Paige, 529.) 2. It is no objection to the award, that it was signed by Joseph Stuart, as well as by the two arbitrators. (1 Hill, p. 489; 1 Barbour, 325.)

III. It is not necessary to set out the terms of the award. (Watson on Arbt., Law Library, vol. 43, p. 89, fol. 134; 6 John 14; 1 Hill, 32; 3 Barbour, 565; 7 Barbour, 431.) 1. Or that plaintiff had any knowledge or notice of award. 2. Or that the award was in pursuance of the terms of submission. (1

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Cowen, 117.) 3. Or that defendant have complied with said award. (Law Lib., vol. 43, p. 152, fol. 259.) 4. Or that the arbitration was conducted according to the terms of the bonds, &c. 5. Or was setting out the bonds necessary in our answer.

IV. Because, on demurrer, all intendments are in favor of the awards being in pursuance of the submission. (1 Cowen, 117; 11 Illinois Rep. p. 565.)

V. And even if the arbitration had proved ineffectual, it would seem that suit could not be brought on the original cause of action until and unless defendant refused to join the plaintiffs in submitting the case under the agreement. (*Mayor of New York v. Butler*, 1 Barbour, p. 325; 1 Hill, 409.)

VI. Our amended answer avers fully sufficient to meet the whole of the second ground of plaintiffs' demurrer.

Can demur to answer only for insufficiency of a counter claim. (See Code, Reply, p. 169; *Smith v. Greening*, 2 Sand. S. C., p. 702; 3 Code Rep. 206.)

M. S. Burlock, for plaintiffs, the respondents.

I. As to the first branch of the answer: 1. The terms of the bonds should be set out so that the court can see whether their terms have been complied with. (Russell on Arbitrators (Law Library, vol. 47), 492, and cases cited.) 2. It does not in any way appear, that the parties agreed to submit the matters in controversy to Joseph Stuart, as umpire. 3. The answer should set out the terms of the award, so that the court can judge whether it is made in accordance with the submission, and whether it is such an award as would be a bar to the action, and whether the parties are equally bound by it; as an award is not a good plea unless it appear that the parties are equally bound by it. (Kyd on Awards, 389. Russell on Arbitrators (Law Library, vol. 47), 492, and cases cited.) All the forms of pleas of award to be found in the books, set out the award in full. (Kyd on Awards, 465; Chitty's Pleadings, vol. 3, p. 927; Tillinghast's Forms, 474; Chitty's Precedents, vol. 1, p. 220; Burrill's Appendix, 3533; Sandford's S. C. Rep., 405.) 4. The answer should allege that the award was delivered to the parties. It is not sufficient to allege that it was delivered to

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the defendant. Each party is entitled to the award. (*Pratt v. Hackett*, 6 John. 14; *Buck v. Wadsworth*, 1 Hill, 321.) 5. It should appear that the award was made within the time required by the bonds. (Russell on Arbitrators (Law Library, vol. 47), 493, and the cases there cited.) 6. It should appear that the arbitration was conducted and submission had pursuant to the terms of the bond. It is not sufficient to aver that it was duly made. (Russell on Arbitrators, 492, and cases cited.) 7. It should appear that the award extends to the whole cause of action, otherwise it is not a good plea to the action. (Kyd on Awards, 384; *Clapcott v. Davy*, 1 Ld. Raym. 612; *Jackson v. Ambler*, 14 John. 96; Russell on Arbitrators, 503.) 8. It should appear that the defendant has performed the award. (Russell on Arbitrators, 503; *Allen v. Milner*, 2 Tyrwhitt, 113; *Brazil v. Isham*, N. Y. Common Pleas, Nov., 1852.)

II. As to the second branch of the answer: 1. It should appear to what amount the goods mentioned in the answer were damaged, and what amount the defendant seeks to have deducted on account of such damage. 2. It should appear by what officers the goods were valued in Mexico, and by whose direction they were so valued, and whether the plaintiffs consented to, or had any notice of such valuation. 3. It should appear in what manner the goods were sold, and that the sum the goods brought at the alleged sale was their full value at the time of their purchase from the plaintiffs, and that the plaintiffs consented to, and had due notice of the time and place of sale.

BY THE COURT. DUER, J.—The answer is manifestly bad in both its branches. The Code has, indeed, abolished all technical rules of pleading, but it has not abolished those which are dictated by good sense, and are necessary to be observed in order to carry into effect its own provisions. It requires that the answer shall set forth “the facts constituting a defence.” The facts, therefore, which are relied on must be set forth at least with so much certainty as to enable the court to say, that admitting them to be true, they constitute a bar to the plaintiffs’ recovery. All the facts set forth in this answer may be true

exactly as they are alleged, and yet the plaintiffs ~~not~~ be entitled to recover.

The first branch of the answer avers that the parties submitted all matters in controversy relative to the note in suit to certain persons as arbitrators, that after the final submission of these matters upon a hearing of the parties, the arbitrators made and published an award, and that their power as arbitrators was not revoked prior to such final submission, all which may be true, and yet the award be on its face a nullity, or if valid on its face, the power of the arbitrators before it was made, may have ceased to exist.

It may not be necessary to set forth the terms of an award which is relied on as a defence, but it is necessary to set forth its substance, so that the court may be able to say that, if such an award was made, the action is barred. Here nothing is stated but the fact of an award which may not have followed the submission, or not have been made within the time limited by the submission, or may by its terms have directed or permitted the plaintiffs to prosecute this very action.

The averment that the power of the arbitrators was not revoked prior to the final submission admits by implication that it was revoked before the award was made, and we incline to think is founded upon an erroneous interpretation of the Statute. The provision in the Revised Statutes, which declares that "neither party shall have power to revoke the powers of the arbitrators after the cause shall have been finally submitted to them upon a hearing of the parties for their decision" (2 R. S., p. 544, § 23), has been held by Chancellor Walworth to be general, but we think it may be reasonably doubted whether it ought not to be construed as referring exclusively to those arbitrations, which the statute professes to regulate, leaving, in respect to other arbitrations, the rule of the common law unchanged, namely, that the powers of the arbitrators may be revoked at any time before they have made their award. It is not necessary, however, to decide this question, nor are we to be understood as deciding it. It is enough that the complaint does not show affirmatively that an award has been made which is a bar to the action.

It is not to be inferred from what we have said that either

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in a complaint, where the action is brought upon an award, or in an answer where an award is set up as a defence, it is necessary to negative a revocation of the powers of the arbitrators. As the proof of such a revocation plainly rests upon the opposite party, so must also its averment.

Next, as to the second defence. The goods sold by the plaintiffs to the defendant and which it is alleged were the consideration for the note in suit, may have been unsound and unmerchantable at the time of the sale, but unless there was a warranty, or fraud in the sale, the defendant is not, for that reason, entitled to any deduction from the price; and as we read the answer, neither a warranty, nor fraud is alleged. It is indeed averred that the goods were sold by sample, but according to the recent decisions in the Court of Appeals, a sale by sample is not a sale by warranty, unless there was a positive agreement that the bulk of the goods should correspond with the sample. As such an agreement is necessary to be proved, it is also necessary to be averred.

So the answer also alleges that the goods were not in the state represented by the plaintiffs, but it does not state what the representations made by the plaintiffs were, or that they knew them to be false; there is therefore no allegation of fraud.

There are other objections to the answer which were urged by the counsel for the plaintiffs, but, without expressing any opinion as to their sufficiency, we prefer to place our judgment upon those which we have stated.

The order allowing the demurrer is affirmed with costs, with the usual liberty to the defendant to amend.

JAMES B. MURRAY v. DELIA SHAVE.

In March, 1851, the plaintiff leased to the defendant a house in the city of New York, for the term of one year from the 1st of May following, at a rent, payable quarterly, of \$750. In April, the defendant being desirous to give up her lease, made known her wishes to the plaintiff, who then entered into a

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new agreement, in writing, with a Mrs. K., by which the latter assumed the lease, bound herself to perform all its covenants, and to pay the rent reserved monthly in advance. Mrs. K. entered into possession, under this agreement, and paid the accruing rent to the plaintiff, with the exception of the last quarter's.

To recover the balance, the plaintiff brought this action, claiming that the defendant was liable for its payment under the original lease.

Held, that the new agreement between the plaintiff and Mrs. K. operated in law to discharge the defendant from the covenants of her lease, and was a virtual acceptance by him of the surrender which she then offered to make.

(Before DUFF & CAMPBELL, J.J.)

April 27; April 28, 1853.

THIS was an action to recover a balance of the annual rent of premises in the city of New York, alleged to be in arrear.

The complaint set forth that the defendant, on or about the 3d day of March, 1851, by an agreement in writing, hired and took from the plaintiff the dwelling-house, known as No. 85 St. Mark's Place, for the term of one year, at the yearly rent of \$750, payable quarterly in advance, together with the water tax, and averred that the defendant had not paid the said rent in full, but that there was still due and owing to the plaintiff on account thereof the sum of \$282, for which sum, with interest from the 1st of May, 1852, judgment was demanded.

The defence set up in the answer was, that, on or about the 20th of April, 1851, an agreement was made between the plaintiff and one Mary Kent, with the assent of the defendant, whereby the said Mary Kent was substituted in the place and stead of the defendant, as tenant to the plaintiff of the premises mentioned in the complaint, for the same term and at the same rent; whereby the agreement in the complaint mentioned, in respect to the liability of the defendant for the rent therein reserved, was wholly annulled.

The action was tried before Mr. Chief Justice Oakley and a jury, on the 6th day of December, 1852.

The execution of the agreement being admitted in the answer, the plaintiff produced and read the same in evidence. The agreement is in the words following :—

“ This is to certify, that I have hired and taken from James

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B. Murray, the dwelling-house known as No. 85 St. Mark's Place, corner of First Avenue, for the sole use and purpose of a private dwelling-house, for the term of one year, to commence the first day of May, one thousand eight hundred and fifty-one, at the yearly rent of seven hundred and fifty dollars (\$750), payable quarterly in advance, together with the water-tax; and I engage not to let nor under-let the said premises, in whole nor in part, nor occupy the same for any business other than above stated, or deemed extra-hazardous on account of fire, without the written consent of James B. Murray, his heirs and assigns, first had and obtained, under penalty, at the option of said Murray, his heirs and assigns, of forfeiture and damages in the amount of at least one year's rent.

"And I do hereby promise to make punctual payment of the rent, in manner aforesaid, and quit and surrender the premises at the expiration of the said term, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. And if the rent reserved herein is not paid according to the conditions above named, or if the other agreements, or any of them, are not fulfilled, I hereby agree that said James B. Murray, his heirs or assigns, may, at his or their option, re-enter upon and re-possess said premises and annul this lease.

"Given under my hand and seal, this third day of March, 1851.

"DELLA SHAVE."

(Witness,) "JOHN B. MURRAY."

The plaintiff thereupon rested his case.

The defendant's counsel then called as a witness, Mrs. *Mary Ann Kent*, who was sworn, and testified as follows: I occupied the premises in question, No. 85 St. Mark's Place, from the 1st day of May, 1851, to the 1st day of May, 1852. I hired them from Mr. John B. Murray. (Plaintiff's counsel admits said Murray was the agent of the plaintiff.) I hired the premises prior to the 1st of May. At the time I hired them I knew Mrs. Shave had previously taken them. I told Mr. Murray if Mrs. Shave gave up the premises I would take them, and after that I did take them, and at the time I took them, I paid a portion

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of the rent in advance. There was an agreement in writing on one side, between Mr. Murray and me; that is, I gave him one, and he promised me one, but he never gave it to me.

The defendant's counsel here asks for the production of the agreement testified to by the witness, and it is produced, endorsed on the agreement of letting to the defendant. It is as follows:—

“In consideration of one dollar to me this day paid by James B. Murray, the receipt whereof I hereby acknowledge, I hereby assume the within lease, and agree to pay the rent of the said house monthly in advance, viz. the sum of sixty-two dollars fifty cents, on the first day of each and every month, and the water rent when due. And I further agree to perform all and every of the covenants therein contained, with the sole change of paying the rent monthly in advance, instead of quarterly in advance.

“MARY A. KENT.”

Dated New York, April 24, 1851.

(Witness,) ———.

Being cross-examined, the witness says: I took three or four receipts from Mr. John B. Murray, and two from his younger brother. Mr. Murray afterwards called upon me and took all those receipts, and gave me a general receipt in lieu of the others. Being asked to produce that receipt, she says: It is at my home, at New Rochelle.

Being further directly examined, she says: When these receipts were taken, Mr. Murray said he would give me a general receipt in full.

Being further cross-examined, she says: Those receipts were signed by Mr. Murray on account of rent received from me.

The defendant's counsel here rested the case on his part, and insisted to the court that the agreement between the plaintiff and the witness, Mrs. Kent, was a virtual surrender of the agreement between the plaintiff and the defendant, and that the complaint should be dismissed. The court said that it would reserve that question, and refused to dismiss the complaint. Whereupon the counsel for the defendant excepted.

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The plaintiff's counsel then called as a witness,

John B. Murray, who was sworn, and testified as follows: I am the agent of the plaintiff, and in that capacity rented the premises in question to the defendant, on the 3d of March, 1851. On the 24th of April Dr. Hanners called on me, and said Mrs. Kent wished to see me. I saw Mrs. Kent, made the agreement with her, and she paid me part of the rent. I gave her a receipt. The receipt is produced by witness, and is as follows:—

“New York, April 24, 1851.

“Received from Mrs. Mary Ann Kent, sixty-two $\frac{1}{2}$ dollars, for one month's rent in advance, from 1st May next, of house No. 85 St. Mark's Place, under lease of said house to Mrs. Delia Shave, dated March 3d, 1851, which lease Mrs. Kent has assumed to pay hereafter (at the request of Mrs. Shave), monthly, in advance. And all future receipts in her name will be to the same effect, and without prejudice to the terms of the lease.

“JAMES B. MURRAY,

“\$62 $\frac{1}{2}$.”

“Per JOHN B. MURRAY.”

My understanding of the matter was, that Mrs. Kent was to be paymaster for the defendant. All the subsequent receipts were made in Mrs. Shave's name.

Being cross-examined, the witness said: Dr. Hanners told me that Mrs. Kent wished to take the house instead of the defendant. I told him that I could not change the tenant. I told Mrs. Shave that I would not make any change. I had no conversation with Dr. Hanners on the subject of his becoming security for Mrs. Kent, as I recollect. Dr. Hanners said that Mrs. Kent wanted to take the premises. I was satisfied that the defendant was responsible. When Mrs. Kent paid me she wanted the receipts in her name alone, without reference to Mrs. Shave. I refused to give her any other. I don't know that she expressed any objection except to the first.

The plaintiff's counsel here rested the case on his part.

The defendant's counsel then called as a witness, Dr. *George M. Hanners*, who was sworn, and testified as follows: I called on Mr. Murray, the last witness, at the request of Mrs. Kent,

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prior to May, 1851, and asked him to transfer the lease of the premises to Mrs. Kent. He said that belonged to his father to do, and he would see him. I told him Mrs. Shave was sick, and wanted to give up the agreement. He asked me if Mrs. Kent was responsible, and if I would go security for her. I told him she had not asked me.

The defendant's counsel recalled

Mrs. *Kent*, who further testified, as follows: I objected to the form of all the receipts given me, and sent one back by the boy Mr. Murray sent with it.

The testimony here closed, and the defendant's counsel again insisted to the court, that the agreement between the plaintiff and Mrs. Kent was a conclusive bar to the action. The court said it would reserve that question, and instructed the jury, that if they found, aside from the agreement, that there was an actual agreement to substitute Mrs. Kent, as tenant, in lieu of the defendant, and she took possession under such an agreement, then they should find their verdict for the defendant, otherwise for the plaintiff.

The jury found a verdict for the plaintiff, subject to the opinion of the court at general term, as to the legal effect of the written agreement in evidence, with the right to order a judgment for the defendant.

J. L. Mason argued for the plaintiff upon the following points.

I. The jury have found that there was no actual agreement to substitute Mrs. Kent in lieu of the defendant as tenant, or, in other words, that it was the intention of the parties, that, notwithstanding the covenant of Mrs. Kent, the original contract with Mrs. Shave should continue in full force.

II. If then the original agreement is superseded, and Mrs. Shave discharged, it is because a construction is put upon the writing executed by Mrs. Kent directly contrary to the intention of the parties.

III. In giving a construction to the instrument, the court will confine itself to its terms, and see what they necessarily import—and will not use it as *evidence* from which a surrender may be inferred. The question presented is, not what may

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be inferred to have occurred previous to the execution of the instrument, and to have given rise to its execution, but, what is the legal effect of the language employed?

IV. Such a construction will not be given to it as will defeat the actual intention of the parties, unless any other construction is impossible, consistently with its plain and obvious meaning.

V. The instrument executed by Mrs. Kent is not, in terms, a cancellation or surrender of the original contract, or a discharge of Mrs. Shave from liability, or a letting of the premises to Mrs. Kent, or a substitution of her in place of Mrs. Shave; nor is it in terms any one of these, but simply a promise by Mrs. Kent, endorsed on the original contract, to pay the rent reserved in that contract, which is thereby recognised as a subsisting and uncanceled instrument.

VI. If then this instrument has the effect of releasing Mrs. Shave, it must be because the simple fact of taking from Mrs. Kent, who enters into possession of the premises, an obligation to pay the rent, is, of itself, a surrender of the original tenancy.

VII. But it is well settled that acceptance by a lessor of rents, from an assignee of the lessee, does not discharge the original liability of the lessee for any rent remaining unpaid; he is still liable to be sued in covenant. (*Jackson v. Brownson*, 7 J. R. 227; *Thursly v. Plant*, 1 Saund. 237; *Archbold, Landl. & Ten.*, p. 35.)

VIII. It is impossible then that the mere promise or engagement, by a person entering into the possession of the premises, to pay the rent, can be construed to be a surrender of the original contract. The natural inference, from the fact of the instrument being endorsed on the original contract, is, that it was intended to be continued, and that the promise by Mrs. Kent was in consideration of the consent to the assignment. The terms of the instrument are more in accordance with the idea of an assignment by Mrs. Shave to Mrs. Kent, than of a surrender to the plaintiff.

R. Goodman for the defendant contra—

I. The agreement of letting to Mrs. Kent implies a release or surrender of the agreement with the defendant. It is a sur-

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render by operation of law. This implication or presumption of law arises from the face and tenor of the instruments, and no other presumption can be supported therefrom. (2 Roll. Abr. 495, L. 41; *Jackson v. Gardner*, 8 Johns. 394; *Stone v. Whiting*, 2 Stark. 233; *Sparrow v. Hawkes*, 2 Esp. N. P. C. 505; *Bailey v. Delaplaine*, 1 Sandford R. 5.)

II. Coupling the acts of the parties with the agreements, the presumption cannot be rebutted. (*Thomas v. Cook*, 2 B. & A. 119; *Smith v. Niver*, 2 Barbour S. C. R. 180; *Watts v. Atcheson*, 3 Bing. 462; *Smith v. Mapleback*, 1 T. R. 441.)

III. The terms of the written instruments could not be varied by parol evidence. The presumption of law is raised from the instruments themselves, and the acts of the parties.

IV. The evidence of the plaintiff's agent, even if admissible, is merely as "to his understanding of the matter," and this understanding is in direct conflict with the written instruments, the acts of the parties, and the understanding of all the other parties and witnesses. There is no evidence that the defendant assented to the arrangement. This assent was dependent upon her release.

V. The verdict rendered in the action should be set aside, and judgment given for the defendant, dismissing the complaint with costs.

BY THE COURT. DUER, J.—It is quite certain that Mrs. Kent did not enter into the possession of the demised premises either as the assignee or sub-tenant of the defendant, yet, unless she held the possession in one or other of these characters, there is no principle of law or equity upon which the defendant can be made responsible for her acts or default. The entry of Mrs. Kent was not under the original lease, and there was no contract between her and the defendant, under which such an entry could be justified. Her entry was, as the immediate tenant of the plaintiff, under a new agreement, varying materially from the original lease, which, in the exercise of his own discretion, he chose to make with her. To this agreement the defendant was in no sense a party, nor does it appear that she had any knowledge of its terms or existence. She was willing that Mrs. Kent should be substituted in her place as the

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lessee, but the admission of Mrs. Kent into the possession was not her act, nor under any title obtained from her, but was solely the act of the plaintiff, under a title derived immediately from him.

Upon the question of law, therefore, reserved upon the trial, our opinion is clearly in favor of the defendant. We do not at all doubt that the new agreement between the plaintiff and Mrs. Kent operated, in law, to discharge the defendant wholly from the covenants of the lease, and was virtually an acceptance by him of the surrender, which, by offering Mrs. Kent as her substitute, she requested to make. We attach no importance to the terms of the receipts for rent which the plaintiff gave to Mrs. Kent; they are evidence only that he wished to do what the law would not permit, bind Mrs. Kent by a new lease, and at the same time hold the defendant liable upon the old. He could not by his own act, without the assent of the defendant, alter the nature of his agreement with Mrs. Kent, nor vary its legal effect. The defendant had a right to determine for herself whether she would be responsible for the performance by Mrs. Kent of the covenants of the lease, and the only proper evidence that she meant to be thus responsible was, an assignment of the lease or a letting of the premises to Mrs. Kent, as her own tenant. As the plaintiff, without this evidence, chose to admit Mrs. Kent into the possession, he could not release himself, nor can we relieve him, from the legal consequences of his act.

We think that the equity of this case corresponds with its law. It is clear from the testimony of Dr. Hanners, that the defendant meant to give up the lease entirely, and requested to be discharged by the substitution of Mrs. Kent as the immediate tenant. These facts were known to the agent of the plaintiff, and if, with this knowledge, he meant to retain the liability of the defendant upon the covenants in the lease, he was bound in good faith to give her immediate notice that such was his intention. In the absence of this notice she had the right to believe that Mrs. Kent was let into the possession in compliance with her request, and in conformity to its terms, and to give a different construction now to the acts and conduct of the parties, would be to give our sanction to what a

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court of equity would hold to be a fraud. We do not think that the rights of the plaintiff are at all affected by the finding of the jury, which we construe as only meaning that there was no agreement between the plaintiff and defendant for the substitution as tenant of Mrs. Kent, independent of that which the law would infer from his agreement with the latter.

The verdict for the plaintiff is set aside, and a verdict and judgment thereon must be entered for the defendant with costs.

JAMES M. HOOD, Respondent, v. THE MANHATTAN FIRE
INSURANCE COMPANY, Appellant.

By the terms of a policy of insurance, against fire, the subject-matter insured was described as a "barque (on the stocks near said ship), building for," &c., "with privilege to build another vessel alongside," "in a ship-yard, on the west side of Taunton River, Massachusetts."

Held, that the policy not only covered so much of the contemplated barque as was actually on the stocks, but also such parts of the framework being in the ship-yard, as had been so far wrought, with the design to make them a part of the contemplated barque, as to be in a condition to be framed, and actually incorporated into the parts on the stocks, and which were in the proper place to be conveniently applied to that use, and which, by reason of being so wrought and fitted, were substantially valueless for any other purpose.

(Before OAKLEY, CH.J., CAMPBELL and BOSWORTH, J.J.)

April 6; May 14.

THIS came before the General Term, on an appeal from a judgment at Special Term, and involves the question of the proper construction of that part of the policy of insurance which describes the subject-matter insured. By a policy dated September 8, 1849, the defendant insured James M. Hood & Co. against loss or damage by fire to the amount of \$7,500, "on a ship on the stocks in a ship-yard, on the west side of Taunton River, in Somerset, Massachusetts," from the first of the said September to the first of the following November.

On or about the 20th of September, 1849, by mutual agreement between the parties to the policy, it was made to apply

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to a barque then being erected on the stocks near the said ship, and the following memorandum of such agreement was, by the defendant, inserted in a blank in the policy, left immediately after the description of the subject insured, and left in the printed form for the description of the subject insured, that is to say :

“September 20, '49. This insurance is transferred to cover barque (on the stocks near said ship) building for Howes, Godfrey & Co., with privilege to build another vessel alongside.”

The complaint alleged the foregoing facts, and a loss by fire occurring on the 17th of October, 1849, to the extent of \$2,500, and averred that “the said loss and damage was by the damage by fire to the frame of the said barque then alongside thereof, in the place described in the said policy, and cut, fitted, adapted, and intended for the said barque, and, in fact, appertaining thereto, and part thereof.” It then proceeded to state, that notice of the loss was given, and a particular account of the loss and damage was delivered to the defendant, with the proper proofs, and that subsequently thereto, all the property and assets of the firm of James M. Hood & Co. were assigned to the plaintiff, non-payment of, and refusal to pay the loss.

The answer, among other things, denied “that within the time insured by said policy, a loss by fire, within the description of fire assumed in the policy, happened to the said barque so insured by the said policy, and then on the stocks in the ship-yard, in said policy mentioned, to the amount specified in said complaint, or to any amount.”

“And these defendants, on information and belief allege, that such timbers, plank, boards or lumber, if any, were in separate pieces, and were not, nor was any part thereof, at the time of the alleged damage or destruction thereof aforesaid, or at any time previously, actually set up and upon the said stocks, in said ship-yard, or worked, or built, or incorporated in the said barque, then on the stocks in said yard, nor could the same, at the time of said fire, have been so incorporated in said barque, until they had been moved, raised, or transported from the place where they then were, and certain work

and labor had been done to connect them with, and to build them into the said barque."

The fire of the 17th of October, "broke out inside of a ship which was on the stocks and nearly completed, and the keel of which was about sixty feet north from the keel of the barque; it burned up the ship, and the frame of the barque. At that time the keel was blocked, and in its place for the barque; some part of the frame was on the south side of the keel, some part on the north side of it; a part was north of the ship; a part of the frame was moulded, hewn and bevelled; some of it had been actually laid across the keel, and fastened to it. The whole frame was in the yard, and two-thirds or three-quarters were moulded; there was no other part of the frame hewn and moulded; the stem-frame and stern-frame were alongside, and had been fastened together, and ready to be put up; the rest was all ready to be put up; it was not framed, but ready for framing; this timber was so cut as to supply this vessel and no other, and was useless for any other purpose. Three hundred and sixty-two sticks, which would have made forty-four frames, and which were ready for framing, were burned; the stem and the stern-frame were not burned. * * * None of these three hundred and sixty-two sticks had been put into frames, but they were ready therefor. * * * The frames could not have been placed on this barque until after they were put together; nothing was needed to be done, but to put them together, and put them up; they were not to be fastened by bolts to the keel, they were to be shoved between the keel and kelson."

The principal question arising upon this evidence being simply the question, whether the property damaged by the fire was covered by the policy, the judge, at the trial, directed the jury to find a verdict in favor of the plaintiff for the amount of the loss proved, to which charge the defendant excepted. The jury found a verdict for \$2,869.44, on which judgment was entered, and from that judgment the defendant appealed.

M. S. Bidwell, for appellant, made and argued the following points.

D.—II.

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I. The judge did not leave to the jury any question whatever; he did not, for instance, leave to them the question, whether, as a matter of fact, these sticks, destroyed by the fire, constituted the barque or a part of the barque insured; nor whether, as a matter of fact, they were "lumber or building materials" mentioned in the subsequent insurance; but peremptorily directed the jury to find a verdict for the plaintiffs. Therefore, unless upon the evidence, these sticks, as a matter of law, constituted the barque or a part of the barque insured; and unless, also, upon the evidence, as a matter of law, they were not "lumber or building materials" mentioned in such subsequent insurance, the direction was erroneous, and the verdict should be set aside. Two principal questions, therefore, are raised by this direction: First: Were these sticks covered by the first insurance? Second: Were they not covered by the subsequent insurance?

II. They were not covered by the first policy. 1. They were not a barque. Though intended and partially prepared to be put into the barque which was the subject of insurance, they had not become a part of it, and were not ready to be put into it, nor were they even framed together; and they could not have become a part of the barque until more work had been done upon them. A barque, like a house, is essentially different from its materials collectively; as water is different from its component gases: it is a result of their combination in certain proportions: though the materials exist, it would be absurd to say that the barque or house exists until the materials are put together, or that the materials are a part of the barque or house, until they are affixed to the nucleus of the structure while in progress. The contents of a lumber yard, a blacksmith's shop, and a warehouse of cordage, &c., do not constitute a barque, or ship, or fleet. The ship results and begins to exist when the materials are adjusted and put together in certain permanent positions. The materials lose the character of lumber, &c., and become barque or ship, &c., as fast as they are worked in and thereby incorporated in it; as a man's dinner ceases to be food and becomes a part of the man as soon as it is eaten and digested and assimilated, and not before. 2. The insurance was confined to a structure on the stocks. There

was, at the time of the insurance, a barque on the stocks, otherwise the policy would not have taken effect. But these sticks were not on the stocks, never had been on the stocks, and at the time of the fire were not ready to be put on the stocks. The policy did not cover timbers or other materials, although intended or prepared for the barque, until actually inserted and built in the barque on the stocks. If these sticks were the barque, then the barque was not on the stocks and the defendants are not liable. (2 Duer on Ins. 644, 646. 1 Phill. on Ins., 285, 347. 2 J. C. 127, 173. 8 J. R. 307.) 3. The other words inserted in the policy, as a part of the designation of the subject, lead to the same conclusion; all of them confine the risk to a particular locality, and exclude a liability for loss to matter in a different place. The subject insured was: 1. A barque; 2. On the stocks; 3. Near the ship; 4. With the privilege of building another vessel alongside. This privilege would be nugatory, if the barque wherever situate or scattered was covered by the policy; and the provision would be absurd to speak of a vessel's being alongside the barque, if the barque consisted of sticks of timber scattered, as these were, all over the yard. 4. Confining the risk to this structure on the stocks was important: if the policy had covered these scattered sticks, the premium would have been greater, and the risk would have been greater. In fact, if the sticks had become a part of the barque on the stocks, no loss would have been sustained: the barque on the stocks was not injured. 5. A different construction would leave it matter of the greatest uncertainty what was the subject insured; whether it was the timber for the barque, as soon as it was felled? or only as soon as it was brought into the ship-yard? or only as soon as work was commenced on it to fit it for the barque? or only as soon as the materials were ready to be framed together? or only as soon as they were entirely ready to be put into the structure on the stocks? or whether, if it was thus ready, but was not in the ship-yard, it would be covered by the policy, or whether it would be covered if in any part of the ship-yard, or only if in a particular part of it, and, in such a case, within how many feet it must be of the stocks? It is to be presumed that the parties could not have intended to enter into such a vague,

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doubtful, and uncertain contract, when they fixed with so much care and precision the very moment of the termination of the risk. 6. The insured themselves, in their preliminary proof under oath, deliberately and carefully made, described the property injured as "timber and lumber,"—as "442 pieces of timber,"—as "ready to be put into the frame of the barque," and as "alongside of the barque. This language shows that the property destroyed constituted, not a part of the barque, but pieces of timber and lumber alongside of it, and designed to be put into it. The plaintiff himself evidently felt that he could not, consistently with truth, swear that the barque was partially or totally injured. This proves that, according to the ordinary use of language, these pieces of timber had not become a part of the barque on the stocks mentioned in this policy of insurance, any more than the moulds, for which, also, the insured made a claim. 7. This construction is in conformity with analogous cases. (*Sillsbury v. M' Coun*, 3 Coms. R. 395, 6 Hill's R. 427; *Fryatt v. Sullivan Co.*, 5 Hill. R. 117; *Johnson v. Hurst*, 11 Wend. R. 135; *Gregory v. Stryker*, 2 Denio's R. 628, Year-book, 5 H. 7, folio 15, cited 4 Denio's R. 335, 336, n.; Wood's Civil Law, 157, 159.) 8. Finally, it is in conformity with an express judicial opinion in a similar case. (*Mason & Leap v. Franklin Ins. Co.*, 12 G. & John. R. 469.)

III. The property destroyed, was covered by the subsequent policy. It was "timber and building material." The insured could have recovered for its destruction under the policy mentioned. It had been "timber and building materials" within the meaning of that policy, and had been covered by that policy. When did it cease to be?

IV. For these reasons, the complaint should have been dismissed.

V. At all events, the jury should not have been directed peremptorily to find a verdict for the plaintiff.

VI. The evidence offered by the defendants and excluded by the judge was admissible, and the exceptions of the defendants were well taken in relation thereto. 1. The policy and receipt were admissible. 2. The proffered evidence of usage was admissible. (1 Duer on Insur. 171, pl. 18.)

VII. The judgment should be reversed.

D. Lord, for respondent, made and argued the following.

I. The frames, as shown in evidence, having been prepared for the barque insured, and made useless for any other vessel, were covered by the policy : they were in fact a part of the barque.

II. They were not lumber or building materials covered by the policy of The New York Fire and Marine Insurance Company.

III. Evidence of the usage of insurers to charge a different premium if timber, framework, &c., were included in a policy, was inadmissible in evidence.

BY THE COURT. BOSWORTH, J.—Prior to effecting the insurance in question, the defendants had insured the firm of James M. Hood & Co. \$7500, "on a ship, on the stocks, in a shipyard on the west side of Taunton river, in Somerset, Mass."

On the 20th of September, 1849, the policy was transferred to a barque building by the same firm. The transfer reads thus, viz. :

"Sept. 20, '49. This insurance is transferred to cover a barque (on the stocks near said ship) building for Howes, Godfrey & Co., with privilege to build another vessel alongside.

"\$7500, 2 months \$22 $\frac{1}{2}$."

On the 17th of October, 1849, a fire originated in the ship referred to, being then nearly completed, by which the ship and the frame of the contemplated barque were burned. So much of the barque as was on the stocks was not burned.

The plaintiff is, by assignment, the owner of the claim of his firm, to be indemnified for the loss.

At the time of the fire, the keel of the barque was blocked, some part of the frame was moulded, hewn, and bevelled, some of it had been actually laid across the keel and fastened to it, the whole frame was in the yard, and two thirds or three quarters was moulded ; the stem-frame and the stern-frame were alongside, and had been fastened together, and were ready to be

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put up. The rest was all ready to be put up. It was not framed, but ready for framing: "this timber was so cut, as to supply this vessel and no other, and was useless for any other purpose."

Four hundred and sixty-two sticks, which would have made forty-four frames, and which were ready for framing, were burned; the stem and stern frames were not burned. About one third of the sticks burned were north of the ship, the others lay between the ship and the barque. The north boundary of the yard was about 120 feet from the keel. The frame was in the usual place for laying timber for a vessel building like the barque. A verdict was rendered for the plaintiff under the direction of the court for the value of the framework burned.

The main question is, What was covered by the policy? Did it cover the framework of the barque, or only so much of the uncompleted barque as was fastened together and upon the stocks?

The plaintiff insists that the former, and the defendant that the latter is the true construction.

The plaintiff insists that the frames which had been prepared expressly and solely for the barque, and were in a condition to be framed into and made literally a part of the body of it, which were alongside of it to be thus applied, and which had been so adapted for the uses for which they were designed as to be valueless for any other, were, within the fair meaning of this policy, a part of the barque, and were covered by the policy.

The defendant, on the other hand, contends, that until they were actually incorporated into the body of the barque, and had been fastened in the places for which they were designed, they formed no part of the barque, but were properly speaking only "lumber and building materials contained in the shipyard," and were not covered by the policy.

The words used in this policy have not received a settled legal construction, nor is it shown that by use and practice between assurers and assured, they have acquired a specific sense, so that the court can construe them according to such acquired sense and meaning.

The defendant does not insure, in terms, an "unfinished barque," but a "barque building." The defendant does not insure a subject matter, which has at the time a definite form, which it is to retain while covered by the policy, and the materials, then composing which, are alone covered by the policy.

But a "barque (on the stocks) building" is insured. These words clearly imply that some part of the structure was then on the stocks, and that the policy was intended to cover more than so much of the structure as was then on the stocks. The defendant concedes that whatever materials should be subsequently incorporated into the structure, would from the moment of their actual incorporation be covered by the policy.

Is the fact of such actual incorporation the test by which to determine, whether the materials, designed and fitted to be component parts of it, and thereby unfitted for anything else, and being in their proper place to be actually incorporated in it, are in that condition a part of the barque, within the meaning of this policy?

The participle, "building," in its popular signification, means "framing and erecting."

Hence it is a common expression, that a house is "framed," when the process of building has reached a point that the framework is in a condition to be put together.

The house is raised when the parts of the framework are placed and secured in their proper position, in a standing structure.

Suppose a "house building," was the subject insured, and a fire should happen after the framing was completed, and before the framework was put together, and the parts firmly pinned to each other, would not the injury to the frame, and all or any of its parts, be covered by the policy?

Suppose the words, "on the stocks," were stricken from the policy, would the intention of the parties, as indicated by the policy, be different from what it must now be presumed to have been? Suppose it had been simply "on a barque building in their ship-yard, in Somerset," would not the policy cover everything made to be, and fitted to be a part of it, and rendered valueless for anything else, although the parts had

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not been placed in position, and firmly secured in their appropriate places, when the fire occurred?

Does the term, "on the stocks," as here used, mean more than this—that the barque, which was being framed and erected, and which was to be covered by the policy, was to be constructed upon the keel then on the stocks, and that nothing was to be deemed part of the subject matter insured, except what might be designed and actually fitted to be a part of the particular structure thus begun? Were not these words used to identify the several parts of this structure, and to distinguish them from parts of the ship in which the fire originated, and from parts of that which the plaintiff had the privilege of building alongside of the barque, if he should avail himself of such privilege?

The *materiel* on the stocks was not a barque; it was not the whole of the subject matter insured. It was a part of the contemplated barque, which the plaintiff was engaged in building, but had not built. It was in its proper place for laying those parts, of a barque building, which had been fitted to the extent these had, for the uses contemplated.

The frame pieces which were burnt, which had been so far wrought with the design to make them a part of the contemplated barque as to be in a condition to be framed, and actually incorporated into the parts on the stocks, which were in the proper place to be conveniently applied to that use, were also parts of the contemplated barque which the plaintiff was building.

They were not parts of a barque actually built. No such thing existed, or was insured. All things made, for the purpose of forming an indispensable part of the contemplated structure, which had been so far completed as to be adapted to such purpose, and which, in consequence of such adaptation, were valueless for anything else, in common parlance and good sense, were equally parts of the contemplated barque, or of the barque building. Without the parts burned, or a substitute like them, there could be no barque.

They were as indispensable to the existence of a completed barque as the part on the stocks. They were as truly in their appropriate place, to answer the purpose for which they were designed, as the part on the stocks.

If not parts of the contemplated barque, what were they?

Were they "lumber and building materials?" It seems the plaintiffs' firm had a policy effected with another company on "lumber and building materials," in the shipyard, in which they were building a barque.

It would seem that one or the other of the policies should cover the loss, unless, upon sound principles of construction, it may be said, that the materials thus insured, may be so changed in form and character by the labor of the artisan, with a view to make them parts of a barque building and also insured, as to be adapted, and in a position to be applied to the end contemplated, and thus made valueless for any other purpose, and yet be neither building materials, nor parts of a barque building; and while in this particular condition be covered by neither policy.

The phrase, "lumber and building materials," conveys the idea of subjects, which may be fitted as well into one structure of a particular class as into any other, and that they are in a condition to be wrought into a form, to be as well parts of one vessel, as of any other vessel of the class.

They indicate the idea of materials no further wrought than to subserve and be adapted to building purposes generally. They do not convey the idea of materials formed and cut, designed and adapted to be parts of a specific building in contemplation, and which, as fast as labor can do it, are being incorporated into the intended building, and which, by means of such adaptation, are valueless for any other purpose.

It seems quite clear that they do not answer the description of "lumber and building materials," as these terms are commonly understood. If they do not, the loss could not have been recovered under the policy on property of that character.

Suppose a wheelwright should effect a policy on the lumber and materials for building carriages, &c., in certain designated premises, and subsequently should effect another policy with another company, on a carriage building for A. B. in the same premises.

After some of the materials have had so much labor expended upon them, that the hubs are morticed to receive the spokes, and the spokes are completed and in their proper position to be, and for the purpose of being, driven into them; and the felloes are completed to be fitted to the spokes, and the

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parts of the body so fashioned as to be in a condition to be put together, all are consumed by fire? Will either policy, on fair principles of construction, attach to them, and if so, which? Are they, in this state, lumber and materials for building carriages, &c., or are they parts of the contemplated carriage for which they are fitted and were designed? or are they neither?

If either, it would seem to be quite clear that they are parts of the "carriage building."

In construing this policy, the fact that the part on the stocks was not burned, is of no consequence. If that had been burned also, the question whether the policy covered any other parts of the contemplated barque, must necessarily have been determined by the same principles and considerations which must control this case on the facts before us.

If all the parts had been burned, including the keel, still, on the construction claimed by the defendant's counsel, neither the stem-frame, nor the stern-frame, nor any parts of the frame which might have been lying upon the keel, but not fastened to it, would have been covered by the policy.

Such a construction is much narrower than can be reasonably supposed to have been within the contemplation of the parties to a contract, the object of which would seem to have been to secure an indemnity to the plaintiff against loss from injury by fire to parts of a vessel which he was laboring to construct, while so constructing it, or for a period named.

Such a construction would limit the operation of the policy to such parts of the contemplated structure as might be on the stocks, and actually united to each other, while other united but detached parts, lying alongside of the keel, equally approximated to actual completion, and of far greater aggregate value, would not be covered by it.

We cannot think that such was the intention of the parties to the contract, nor that its terms coerce us to adopt the construction claimed by the defendants.

We concede that *Mason & Leap v. The Franklin Ins. Co.*, 12 Gill. & John. R. 469, is, in its facts, substantially like this. That was decided as a case of first impression. That is the only case, apparently, in point, to furnish any aids in the disposition of this case not had by the court in the decision of that. In

that case, the court gave the conclusions which they formed, without stating the considerations by which their judgments were controlled.

Of that case, it may be said, that the articles burned, for aught that appears, might as well have been used, and were as well adapted for the spars and rigging of some other vessel as that for which they were furnished. If substantially as valuable, and well adapted for such a use as that for which they had been bought, the fact is certainly one of some importance.

In that case the ship had been launched before the fire occurred. As a matter of substance, she had been built, but was not rigged, nor in every other respect fully finished.

In this case, the work of building had not so far progressed, as to have placed the different parts in such position as to have given them even the form of a skeleton of the "barque building." Unless the words, "on the stocks," are to be regarded as of themselves restrictive of the meaning, which would otherwise be given to the words, a "barque building," we cannot think effect will be given to the intention of the parties, otherwise than by holding that all the materials which had been wrought with the intent that they should be, and which were fitted to be parts of the contemplated barque, and which, by reason of such adaptation, were valueless for other purposes, which were lying in the ship-yard in the appropriate place to be, and with the intent that they should be incorporated into the structure, were parts of the "barque building," within the meaning of the words as used in the policy in question.

We think the words, "on the stocks," were not used to restrict the natural meaning of the words, "barque building," but merely to indicate the parts on the stocks as specific parts of the barque to be built, and the locality which the keel was to occupy until the structure was completed, and to aid in determining, in case of a loss by fire, whether parts of a vessel or bark, fitted and ready to be incorporated into the body of a vessel, were actually parts of the intended barque or not.

Although the case is not free from doubt, yet we cannot resist the conviction, that the frames that were burned were as much parts of the contemplated barque as the keel on the stocks, within the meaning and intent of the parties, as evi-

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denced by the fair construction of their contract. The judgment appealed from must therefore be affirmed.

JOSEPH OGDEN v. THE GENERAL MUTUAL INSURANCE CO.

The defendants insured the plaintiff for the sum of \$10,000 upon freight. The insurance was against total loss only, and the policy contained an express stipulation, that the defendants "should not be liable for any partial loss whatever."

Held, that the insurance was upon the whole freight as one integral subject, and not upon the separate items of freight, upon distinct and separate parts of the cargo, shipped by different shippers.

Held, therefore, that if any freight had been earned, or could have been earned upon any part of the cargo, the plaintiff was not entitled to recover.

The ship to which the insurance related, returned in distress to New York, her port of departure. Before her arrival on this return, there had been a necessary jettison of a part of her cargo; another part was so damaged that it could not be reshipped; but the residue was wholly undamaged. The ship was repaired within a reasonable time, at a cost of much less than half her value, and then proceeded with a full cargo to her original port of destination; but, in the interval, the master had sent forward the undamaged goods by another ship, at an increased freight, exceeding largely that which he was entitled to receive upon them.

Held, that there was no total loss of freight, within the meaning of the policy, since the master might have entitled his owner to freight upon the undamaged goods, by retaining them, and carrying them forward in his own vessel. The loss of freight, therefore, upon these goods, was not owing to the perils insured against, but to an unnecessary and voluntary act of the master.

Held, also, that as the undamaged goods, although sent forward in another ship, arrived in safety at their port of destination, freight was in fact earned upon them; and that, with the increased cost of earning it, as it was not in any legal sense a consequence of any peril insured against, the defendants as insurers had no concern. It formed no part of a loss for which they could be liable.

Upon these grounds, verdict for the plaintiff set aside, and new trial granted—costs to abide the event.

(Before OAKLEY, CH. J., CAMPBELL and BOSWORTH, J.J.)

April 14, 15, 18, 19. May 28, 1853.*

* The defendants, in the first instance, had demurred to the declaration in this case, upon the ground that it appeared upon its face that there had been no

APPEAL from a judgment at special term, denying a motion on behalf of the defendants for a new trial, upon exceptions taken upon the trial. The cause was tried before the Chief Justice and a jury, in February, 1850.

The action was upon a policy of insurance, executed by the defendants. By the policy, the defendants insured the plaintiff to the amount of \$10,000, "against total loss only," upon the freight of goods, laden or to be laden on the ship *St. Patrick*, which was valued at \$48,000. A technical total loss of the vessel was to constitute a total loss of freight. It was expressly stipulated in the policy that it was without prejudice "to any other insurance upon actual freight," whether effected before or after its date; that the defendants "shall not be liable for any partial loss whatever, nor for general average or expense, nor entitled to any salvage in case of loss." The policy also provided and declared "that the said freights, hereby insured, are valued at \$10,000, carried or not carried, earned or not earned; policy proof of interest."

The policy, when executed, was to continue in force from the 18th of December, 1844, to the 18th of December, 1845. On the 30th of December, 1845, it was renewed and continued in force until the 30th of December, 1846, and contained a provision, that, if then absent, the policy might be renewed three months, at a *pro rata* premium.

The *St. Patrick*, at the time the policy was effected, was owned by certain persons named in the declaration, and they continued to own her until the time of the alleged loss. The policy and renewal were effected for their account and benefit, and to cover and protect their interests on the freights of the said ship on her several voyages, she being employed as a general ship, carrying cargo on freight between New York and Liverpool, or other transatlantic ports.

She sailed on the voyage in question from the port of New

total loss of the freight. The Superior Court gave judgment for the defendants upon the demurrer. The Supreme Court affirmed the judgment, but it was subsequently reversed by the Court of Appeals. Why the case has not been published in the Reports of that Court I am unable to say.—[BARONZEE.]

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York, on the 6th of October, 1846, bound for Liverpool, with a full cargo of lawful goods on freight.

The agent of the owners for procuring freight in New York, had advertised that she would take cargo on freight for such a voyage; and the cargo had been received on board from a large number of different shippers thereof, to whom bills of lading, in the usual form, had been given, signed by the master of the ship.

The aggregate total amount of freight and primage for the voyage, agreed by the shippers thereof to be paid for the whole cargo, upon its delivery at Liverpool, was about \$8,524¹/₄.

The ship having set sail and proceeded on the voyage, encountered repeated storms and hurricanes, was rendered leaky, and was so badly strained and injured as to be obliged to seek a port of necessity, and the master put her back for New York.

After the ship was turned back, a part of the cargo was necessarily thrown overboard to relieve the ship. The freight and primage on this part of the cargo, according to the rates specified in the bills of lading, amounted to \$1,627¹/₄.

On the 2nd of November, the ship reached the port of New York, and was made fast to the Atlantic Dock.

The next day a formal survey of the ship and cargo was had, and it was found necessary to unload the cargo.

It was all unloaded and stored, except a part not necessary to be stored.

A part of such cargo was perishable, and was so much damaged by the perils insured against, that it could not have been delivered at the port of destination, in specie, as merchandise, or otherwise than as a mass of corruption; or could not within a reasonable time have been restored to such state that it could have been reshipped without danger to the ship or crew, and was sold by the master.

The freight and primage on all the articles sold amounted to about \$5,588¹/₄.

The ship was put on a dry dock very soon after she was discharged. She was repaired, and proceeded to take in an entirely new cargo, for Liverpool.

The gross cost of the repairs made upon said vessel while in

port, amounted to \$6,224 $\frac{1}{4}$; from which one third of the cost of new repairs being deducted (new for old), the net partial loss amounted to \$4,216.31.

After being so repaired, she cleared from the Custom House on the 15th of December, 1846, on a voyage to Liverpool, with a full and entire new cargo on freight, and arrived in safety at her port of destination.

Between the two periods of her sailing freights rose. While the St. Patrick was being repaired, the master and Mr. David Ogden, who had been appointed, by the master on his return to New York, an agent to manage the whole business, "determined to tranship the residue of the cargo. The matter of retaining the goods not damaged and carrying them forward in the same ship was discussed, and they determined not to do it. The master determined that it was for the best interest of all concerned to reship them in other vessels, though at an increased freight."

They were reshipped at a freight of £417, 15s. and 11d. The freight by the St. Patrick on this part of the cargo was to be £251, 16s. and 5d. The expense of storage, labor, lighterage, resalting provisions, cooperage, &c., on this part of the cargo amounted to \$366 $\frac{1}{4}$.

The disbursements for the St. Patrick, and expenses in preparing for and fitting her for the voyage in October, were \$4,016, including pilotage.

The injury to the vessel did not amount to a technical total loss, and "she was repaired and sailed within a reasonable time."

At the trial, the judge presiding charged the jury (among other things), that "according to the true construction of this policy, the plaintiff cannot recover, unless he has shown that the whole freight was lost; an actual total loss is necessary, as distinct from a technical total loss."

That as to the jettisoned goods there was a total loss of freight.

That as to the damaged goods which were sold, the freight on them was totally lost, if they were so damaged by perils of the seas, as to have lost their character, and could not have been delivered at the port of destination, in a piece, as merchandise, or otherwise than as a mass of corruption, and could

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not within a reasonable time have been restored to such a state, as that they could have been reshipped, without danger to the ship or crew.

That if the part of the cargo not jettisoned nor necessarily sold, had been retained by the master and carried on in the same vessel, "there could be no recovery in this action. The ship would then have earned a part of her freight, and there could not have been a total loss."

"That if the expense of preparing to proceed on the voyage exceeds the freight to be earned, so that all the freight is absorbed, without paying anything to the shipowner, he is not bound, under such circumstances, to go on with the operation—a losing one.

"Accordingly, if the jury shall find that the new freight paid on the goods shipped by other vessels was according to the rate then usual, and exceeded the original freight thereon, and that the expenses of the ship, such as wharfage, pilotage, labor, wages, provisions, and other charges on freight which would need to be incurred in sending forward the ship with goods capable of reshipment, would have exceeded the freight to be paid for such goods, and the small sum received as freight on the goods returned to the shippers, then the ship was not bound to proceed with these goods, and the freight on them was lost under the policy."

He further instructed the jury "that there was no right to abandon the voyage on account of the injury to the ship, and that the expense of repairing her was not to be taken into view."

He was requested to charge (among other things) "that there had been no total loss of freight."

The jury found a verdict in favor of the plaintiffs for \$10,374¹¹/₁₆.

A. Hamilton, jun., and *S. Jones*, now insisted that the judgment at Special Term ought to be reversed, and a new trial granted, upon the following grounds.

I. That there has been no actual loss of freight.

II. That by the true construction of this policy, the defen-

dant is liable only for an actual or technical total loss of the ship.

III. That the freight on the jettisoned goods was to be deemed and treated as earned, and to be paid by the subjects saved and benefited thereby (2 Phill. on Ins. 92; Ibid. 141; *Simons v. White*, 3 Barn. & Cress. 308).

IV. That the ship having been repaired in a reasonable time, and at an expense far less than half her value, and having, shortly after being so repaired, received freights as a general ship, and proceeded to the port of destination for which she first sailed, she might and ought, and was bound to receive and take on board the undamaged cargo, and such as could be carried with safety of her original lading, and have carried the same to the port of destination.

V. The ship having been repaired in a reasonable time, and ready to resume her voyage already entered upon, the additional expense of transporting this cargo must be borne by the carrier or ship-owner; and if he sustain a loss, he had still earned his freight thereon, and the loss is partial and not total within the policy.

VI. The ship having been refitted as aforesaid, even if the ship-owner was at liberty to send the goods in other vessels, the freight earned by the original ship, by that portion of her new cargo which was put in the place of this undamaged portion of the cargo, should be allowed to the defendants, the underwriters (*Green v. Royal Exchange Assurance Company*, 1 Marsh. Rep. 447).

VII. The ship having been refitted as aforesaid, the additional expense of refitting her, attending the transportation of the cargo, by reason of the retardment of the voyage, must be borne by the ship-owner, or is the subject of general average, and cannot be deducted from the freight earned, or which might be earned by the original ship.

VIII. That freight having been lawfully received and earned on goods returned to shippers, at their request, in the port of New York, there was not an actual total loss of freight (*Whitney v. New York Firemen's Ins. Co.*, 18 John. 208).

IX. That full freight in some cases, and fifty per cent. of freight in others, having been received by the plaintiff, under

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a claim of right to receive the same, there was not an actual total loss of freight.

(Preceding nine, same as the nine taken at the trial.)

X. That the identity of the voyage was not changed by the substitution of a new cargo; and that freight having been earned on the substituted cargo, there was not a total loss of freight under this policy (*Green v. Royal Exchange Assurance Co.*, 6 Taunton, 68; *Everth v. Smith*, 2 M. & Selwyn, 278; 2 Phill. Ins. 357).

XI. Where, by the express terms of the policy, the underwriters are not liable "for any partial loss whatever," they cannot be rendered liable for any loss which is partial in fact, and total only by construction of law (*Griswold v. New York Ins. Co.*, 3 John. R. 321; *Bradhurst v. Columbian Ins. Co.*, 9 John. R. 17; *Saltus v. Ocean Ins. Co.*, 14 John. 138; *Murray v. Hatch*, 6 Mass. R. 465).

XII. The court erred in admitting the evidence as to the amount of expenses in fitting the vessel for sea, previous to the sailing on the 17th of December; and also in rejecting the evidence offered to show that the freight of the cargo with which she sailed on 17th December, was larger than that which was payable on the previous cargo.

F. B. Cutting, for the plaintiff, resisted the motion, and claimed an affirmance of the judgment. He made and argued the following points.

I. There was a total loss of freight within the meaning of the policy. 1. The freight on the goods damaged and not forwarded to Liverpool, was lost. The charge of the judge upon this branch of the case is correct in point of law; it was not excepted to; and the finding of the jury is conclusive as to the facts.

The amount of freight and primage upon the whole cargo, was £1,775 18 3, which, at	
\$4 80,	\$8,524 22
The freight and primage on the cargo sold in New York, and no part of which was earned, was	\$5,588 40

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(*Whitney v. New York Ins. Co.*, 18 Johns. 208; *Roux v. Salvador*, 3 Bing. N. C. 266; *Salters v. Ocean Ins. Co.*, 12 Johns. 107; *Vlierboom v. Chapman*, 13 Mee. & W. 230.) 2. As to the remnant of the cargo capable of transshipment, the ship-owners were not bound to keep it in store, incur the expense of preparing for and resuming the voyage, and of retaining the cargo, &c. The expenses would have exceeded the freight to be earned by performing the voyage. They had the right to abandon it, and might have sold the ship, or otherwise disposed of her. The charge of the judge upon the point is correct. The jury have found that the freight paid for forwarding this part of the cargo by other vessels was according to the rate then usual, and exceeded the original freight thereon. They have also found that the expenses of the ship, such as wharfage, pilotage, labor, wages, provisions and other charges on freight, which would have been incurred by sending forward the *St. Patrick* with the goods capable of reshipment, would have exceeded the freight to be earned for such goods, and the small amount received from the shippers or underwriters on the goods delivered up in New York (*Ogden v. Gen. Mutual Ins. Co.*; Court of Appeals, reversing the judgment of the Supreme Court; *Bryan v. The American Ins. Co.*, 25 Wend. 617; *Treadwell v. The Union Ins. Co.*, 6 Cowen, 270, 275; *Pezant v. The National Ins. Co.*, 15 Wend. 453, 457; *Salters v. The Ocean Ins. Co.*, 12 Johns. 107; *Hudson v. Harrison*, 3 Brod. & Bing. 105; 2 Phil. on Ins. 327, 323, 150; *American Ins. Co. v. Center*, remarks of Chan. WALWORTH, on pages 53 and 54, 4 Wend. 45). The fact that the owners of the ship acted in good faith in transshipping this part of the cargo, and in breaking up the voyage, was not disputed.

The freight specified in the bills of lading	
for this part of the cargo was	£251 16 5
The cost of transshipping by other vessels	
was	417 15 11
Besides other expenses to put it in a condi-	
tion to re-ship, viz.	\$366 12

3. The freight on the goods jettisoned was also lost. Loss of freight by jettison was one of the points expressly assumed. If the whole cargo had been thrown overboard, the right to

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recover for a total loss would have been clear. (Per Court of Appeals—*McGrath v. Church*, 1 Caine's R. 196 ; *Pezant v. National Ins. Co.*, 15 Wend. 453.) At the time of the jettison, the ship had relinquished the prosecution of the voyage, and was endeavoring to reach her port of departure. Even if there could have been a claim to make good the freight lost by the jettison, by contribution in general average, it would have been in the nature of salvage, and to have been collected by the underwriters. By the terms of this policy, the benefit of salvage belongs to the assured. The freight and primage upon the articles jettisoned, specified in the bills of lading, amounted to £339 0s 5d, equal to about \$1,627²/₃.

II. The receipt by David Ogden, after the voyage had been broken up, from Sands, Fuller & Co., of freight upon their goods ; the retention by him of an amount equal to the freight out of the proceeds of the sales of the cargo abandoned to the Atlantic and New York Insurance Companies, and the arrangement with Mr. Routh, through Francis Griffin, Esq., in March, 1848, did not defeat the plaintiff's right to recover for a total loss : David Ogden had the right to endeavor to save for his principal as much as possible by way of salvage.

III. The freight earned on the subsequent voyage, did not enure to the benefit of the defendant. 1. They had expressly relinquished, by the terms of the policy, any benefit of salvage. 2. The ship sailed on the new voyage on the 17th December, 1846, and the policy expired on the 30th December, before she could have delivered her cargo. The underwriters would not have been liable for any loss happening during the voyage, after the policy had expired.

IV. The loss of freight by the damage to the cargo, and by the jettison, left the voyage not worth pursuing. There was, for all practical purposes, and in any reasonable view of the case, a total loss of the freight for that voyage (15 Wend. 457, per Bronson, J. ; 4 Ib. 53, 54, per Chancellor Walworth ; 25 Wend. 617 ; 2 Phil. Ins. 356-7, 323, 325).

V. The offer to prove the amount of freight by the freight list of the ship upon the cargo with which she sailed on the 17th December, 1846, was properly disallowed. It was irrelevant and immaterial.

VI. Proof of the expenses incurred in preparing and fitting the *St. Patrick* for sea (independently of the cost of repairs), was not irrelevant. It was proper to be considered in reference to the question, whether the owners were bound to have retained and carried on that portion of the cargo which was capable of transshipment.

VII. There is no exception to the charge, except so far as it did not conform to the points made by the defendants.

By THE COURT. BOSWORTH, J.—The construction given to this policy by the charge to the jury, treated it as a policy upon freight as an integral subject, and not upon the several items of freight upon the distinct and separate parts of the cargo shipped by different shippers. The freight insured was treated as a totality, and the jury were instructed, that, if the undamaged goods, instead of being transhipped in other vessels, had been retained and carried on in the *St. Patrick*, “there could be no recovery in this action; the ship would then have earned a part of her freight, and there could not have been a total loss.”

The defendants, upon this motion, are entitled to a just and full application of that rule of construction. It was one for which they contended at the trial, and the plaintiff, instead of controverting or excepting to it, sought to bring himself within it, by showing a loss of freight on every part of the cargo, total in judgment of law.

The jury were also instructed that “there was no right to abandon the voyage on account of the injury to the ship.”

The opinion delivered in the Court of Appeals states that “there was no obligation to abandon the voyage, nor had the assured, or their agent, a right to do so, by reason of the injuries sustained by the vessel, unless they extended to at least one-half of her value.”

It is proper to observe here that the cause was before that court on a demurrer to the declaration, which admitted the facts stated in the latter to be true. How far the facts established at the trial correspond in substance and effect with those which the Court of Appeals regarded as admitted by the

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demurrer, it may be necessary to consider, in respect to some of the points made and argued in this motion.

The opinion referred to further states, that "the declaration contains, in general terms, a sufficient allegation of an abandonment of the voyage, and a consequent loss of freight within the terms of the policy. It would, nevertheless, be invalid, if the statement of the particulars of the loss showed that such loss was in fact partial."

The opinion of that court, and the charge to the jury, concur in the proposition, that the assured had no right to abandon the voyage, by reason of the injuries sustained by the vessel.

It must be also taken as true, that the ship was repaired, and sailed within a reasonable time for the original port of destination; and was repaired with a view to obtain and carry, and did carry a full cargo on freight to that port, from the port of necessity at which the repairs were made. She might have retained, and carried forward the undamaged goods. And the jury were instructed that, if she had retained and carried them forward, the loss of freight would have been partial, and not actually total, and no recovery could have been had in this action.

If this view be correct, and if the true rule as to the undamaged goods was stated to the jury, then it follows that, on the state of facts then existing, it depended entirely on the arbitrary volition of the assured whether the loss should be absolutely total or only partial, and not upon the question whether he had been prevented by the perils insured against, from entitling himself to the freight of some part of the cargo.

He had no right to abandon the voyage on account of the injuries to the ship. Those injuries were repaired, with the view of going to, and she did within a reasonable time sail for, the original port of destination, and carried and delivered a full cargo at that port. She could have carried these goods; and had she carried them, there could have been no recovery by the plaintiff. Freight might have been earned by carrying them in this ship.

The election to not so carry them, it is claimed, subjects the defendants to a liability for the amount insured; while an elec-

tion to so carry, and having thus carried them, would have exonerated the defendants from all liability.

The practical question, as the cause was submitted to the jury, is this: Does, or can the liability of the defendants be made to depend upon the will of the assured, or does it depend upon facts, irrespective of what his will or election may be, with reference to such facts?

To answer this question understandingly, it is important to ascertain what is the precise nature of the contract of insurance on freight. Where the insurance is against actual total loss only, it is an undertaking that if the shipowner is prevented from earning any freight by any of the perils insured against, the underwriters will make good the loss on freight to the amount of their subscription.

In the case of a valued policy on freight, and an actual total loss, the underwriters, as a general rule, must pay the sum named in the policy.

But the underwriters do not contract that the voyage shall yield a profit to the assured, nor that it shall not cost him more to deliver the cargo, according to the terms of the bills of lading, than the aggregate gross amount of freight payable on the delivery of the cargo, or the sum named in the policy as the measure of the underwriters' liability in the case of total loss.

They contract that a technical total loss of the vessel shall not be occasioned during the voyage by any of the perils insured against; or, such an event not happening, that the assured shall not be prevented by such perils from transporting and delivering some part of her cargo, in specie, at the port of destination.

If the perils insured against have neither caused a technical total loss of the vessel, nor prevented the carrying and delivery of some part of the cargo in specie, so as to entitle the assured to freight, then the underwriters are not liable, for the reason that some freight has been earned, or might have been, if the assured, or their agents, had performed their duty. And they cannot make their omission to perform their duty the ground of liability on the part of the underwriters.

The underwriters do not undertake to indemnify them against a loss of freight resulting from the non-performance of duty, but only against an actual total loss of freight, which the perils

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insured against shall have prevented them from earning. With the cost, to the assured, of earning it, the underwriters have no concern.

To avoid misconstruction, it is proper to remark, that by the cost of earning freight, it is not intended to intimate that the proportion of losses arising from the perils insured against and forming a subject of general average, properly chargeable on freight, is a matter that does not concern the underwriters, or that it is not to be regarded in determining whether that and other losses chargeable on freight only, may or may not make a case of actual total loss of freight.

When the ship becomes changed, by necessity, during the voyage, and the goods are sent forward by the master in a substituted ship, in the discharge of a duty for the benefit of the owner of the goods at an increased freight, the increased freight is a charge upon the goods, and must be paid by the insurer of the cargo. (*Mumford v. Commercial Ins. Co.*, 5 L. R. 262; *Searle v. Scovell*, 4 J. Ch. R. 218; *Dodge v. Marine Ins. Co.*, 17 Mass. 471; *Hugg v. Augusta Ins. and Banking Co.*, 7 How. U. S. R. 695-609.)

Where a ship puts into a port of distress for repairs, and to enable the repairs to be made, the cargo is necessarily unloaded, the charges of unshipping and re-shipping the cargo, will generally fall on the underwriter on freight.

The charges of wages and provisions incident to a delay for repairs, are not chargeable to the underwriter on freight, any more than to an underwriter on the ship.

In England these expenses do not give a claim to either general or particular average. It is a part of the obligation of a shipowner to keep a competent crew on board at his own expense, from the commencement to the end of the voyage. (*Jackson v. Charnock*, 8 T. R. 209; *Plummer v. Wildman*, 3 Maule & Selwyn, 482; *Power v. Whitmore*, 4 Maule & Selwyn, 481.)

Where the damages to be repaired are such as to give a claim to general average, these expenses, by the law of this country, are to be contributed for, as general average. (2d Arnould on Insurance, 914, and cases cited in note 1.)

With these qualifications, it may be said, that with the cost to the assured of earning freight, the underwriters have nothing

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to do, and the amount of such cost does not enter into the consideration whether the latter are or are not liable for an actual total loss of freight. / They do not undertake that the wages of the master and crew, and the necessary provisions for the voyage, shall not cost more than the amount of freight to be earned. / The impossibility of entitling the assured to any freight, arising solely from the perils insured against, is the only event on which the underwriters can be made liable. /

In this case, by the express terms of the policy, it was "specially agreed, that this company shall not be liable for any partial loss whatever, nor for general average or expense."

Herbert v. Hallett, 3 J. C. 93, was an action upon a policy on freight, valued at \$2,200, from New York to the Havana. The vessel, after encountering a gale of wind, and being driven on shore, was obliged to return to New York. The cargo was in part so damaged as to be incapable of being carried to the port of destination.

As to portions of the cargo, it did not appear what became of them. It was the opinion of a shipper of a part of the cargo, who was acquainted with the cargo before the brig sailed, and who received the goods into his store, on their return, that most of the cargo was so much damaged, and the voyage so broken up, as not to be worth pursuing. The vessel was repaired in a reasonable time, and proceeded on another voyage. There was no proof of an abandonment by the plaintiff.

It was held that the assured had no right to recover, as he ought to have insisted on carrying on the goods so as to entitle himself to the freight, and having lost the freight by his negligence or folly, the insurers were not liable.

KENT, J., remarked: "It appears to me that the same peril, and to the same extent, ought to exist, to authorize a recovery on a policy on freight, as on a policy on the ship, and that before the insured can recover, in either case, as for a total loss, the ship must be rendered unable to perform the voyage. * * If, in a like case, he could not recover a total loss on a policy on the ship, I see no good reason why there should be a recovery for a total loss of freight. It would involve the absurdity of assuming, in the one case, that the voyage was lost by the peril, and in the other, that it was not lost."

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Each of the judges who gave opinions in that case, spoke of the fact that the vessel was repaired at a small expense, but no point was made as to the relative amount of the expense necessary to send forward the undamaged part of the cargo, and the freight to be earned by carrying that part of the cargo.

The point decided by the case is, that the ship-owner was not prevented by the perils insured against from completing the voyage, and entitling himself to freight on a part of the cargo, and, therefore, there was not an actual total loss of freight.

Moody v. Jones, 4 Barn. & Cress. 394, was an action upon a policy on freight of the ship *Isabella*, from Kingston in Jamaica, to Liverpool. The vessel, after commencing her voyage, was compelled, by injuries arising from the perils insured against, to put back to Kingston for repairs, and to unload the whole cargo. The injuries to the vessel were repaired, but part of the cargo was so damaged that it could not be re-shipped without danger from ignition to the ship and the rest of the cargo, unless it underwent a process of washing with fresh water, and then drying in the sun, which would have detained the vessel six weeks, and been attended with expense equal to the freight. They were sold by the master, who proceeded on his voyage with the rest of the cargo, being unable to obtain other goods to complete his cargo in a reasonable time. He carried with him the proceeds of the damaged cargo, and paid them to the parties interested, without retaining the freight of the goods sold. His proceedings in Kingston were found to be such as a prudent man uninsured would have adopted.

The court said: "It is very proper that the master should exercise a discretion, whether it be more fit to leave the goods behind and give up the value of the freight, than to bring them home. But it by no means follows as a consequence, that if he does, in the sound exercise of his discretion, leave part of the goods behind, and his owner thereby loses freight *pro tanto*, he can throw the loss on the underwriters."

In that case it is obvious that the goods could not have been carried forward in their damaged condition. But they could have been restored to a condition in which they might have been carried forward. It would have cost, however, an expense equal to the freight, besides the delay it would have

occasioned to the voyage. The expense, however, would have occasioned, practically, a total loss of freight on this part of the cargo, if there can be said to be a total loss, because it costs the amount of it to earn it. But there was no loss of freight, if by that be meant merely an impossibility of entitling the ship-owner to it, arising from the perils insured against. In the latter sense there was no loss of freight, and the court held the plaintiff not entitled to recover. The master failed to earn it, by electing not to earn it. The ground of his so electing was, that to earn it would not yield a profit to the ship-owner. He was not prevented by the perils insured against from earning it, and hence the underwriters were not liable. With the mere cost of earning it they had nothing to do. Such a consideration formed no part of the terms or conditions of their contract. (1 Wood & Rob. 103; *Brockelbank v. Sugure*, 1 B. & Ad. 81, for the terms of the policy.)

It may probably be now regarded as settled law, that where the cargo is necessarily unloaded at an intermediate port in the course of the voyage, for the repairs of the ship, and on survey is found to be so sea-damaged that it must inevitably perish from putrefaction, before it can be carried to the port of destination, it may be justifiably sold, and the underwriters are liable for an absolute total loss of freight. This is on the principle that the earning of freight has become an absolute impossibility by reason of the perils insured against. (*Roux v. Salvador*, 3 Bing. N. C. 266; 7 How. U. S. R. 595.)

The right to insist that there was a total loss of freight upon the undamaged goods would have necessarily been the same as to the whole cargo, if all had been undamaged, and could have been sent forward, and had been sent forward by the master at the same increased freight, "if the expenses of the ship, such as wharfage, pilotage, labor, wages, provisions, and other charges on freight, which would need to be incurred in sending forward the goods, would have exceeded the freight on the whole cargo."

In such a case, whether it would be wise or foolish for a merchant to send on his goods, if the master insisted on his right to retain and forward them, or to be paid his full freight, is a question which cannot affect the relative rights of the

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assured and the underwriters on freight—the latter of whom can never be justly made responsible for any loss on freight, arising from the neglect or laches of the assured, or of the master as his agent. (1 J. R. 205; *N. and L. Griswold v. N. Y. Insurance Co.*, 3 id. 321, S. C.)

In the latter case, the question was discussed and decided, whether the fact that the value of the damaged cargo would not have been worth the amount of the freight at the port of delivery, would justify the assured in abandoning the voyage, and entitle them to recover for a total loss. The court said that “whether it would have been wise or foolish in the shippers to have sent on the flour in the condition it was in, was a question not to be put by the plaintiffs. It was none of their concern. The risk of the value of the cargo at the port of delivery lay with the owners of the cargo. All that the plaintiffs had to do by their contract was to provide the means to take on the cargo, by repairing their ship, or procuring another.

If the damage done to the ship can be repaired within such time as not to spoil the goods by the delay, the master is bound to repair, and has a right to detain the cargo a reasonable time, until such repairs are finished, unless the full freight is tendered by the shipper of the goods. (*Clark v. Mass. F. and M. Ins. Co.*, 2 Pick. 104.)

If the master waives his right to insist on the full freight, but instead thereof, permits the shipper to take his goods away, and forward them in another ship, the ship-owner cannot avail himself of the master's laches, and recover as for a total loss against the underwriters on freight. (3 J. C. 93; 3 J. R. 421; 2 Pick. 104; *Hugg v. Augusta Ins. and Banking Co.*, 7 How. U. S. 595.)

Jordan v. Warren Ins. Co. (1 Story C. C. R.) was a case of insurance on freight, on a voyage at and from New Orleans to Havre. The vessel was compelled to put back to New Orleans, in consequence of injuries from the perils insured against. The cargo, consisting principally of cotton, worth about \$60,000, was so much damaged, that it would have required some six months to dry, sort, and repack it, and put it in a condition for commercial purposes. The whole cargo was worth \$71,000.

The damaged part was sold for \$19,744²²/₁₀₀. The residue, being in a sound state, and worth about \$2,210, was shipped for Havre in another vessel. The injury occurred on the 7th of June, and the vessel was repaired and fitted for sea before the 21st of July following; and on that day sailed with a new cargo for England, landed that cargo, and earned the freight. A total loss on freight was claimed, but it was decided that the plaintiff was not entitled to recover.

Justice Story said: "The ship was repaired, and capable again of taking on board the cargo at New Orleans within a reasonable time. The master had a right to require that it should be so taken on board, and carried on the voyage, as soon as it should be in a condition to be safely reshipped. He had a right to wait until the cargo could be dried, sorted, repacked, and prepared for reshipment. The delay arising thereby would be a mere retardation, or temporary interruption, or suspension of the voyage, and not an utter prostration or destruction of it. If, then, the freight has been lost, it has been lost by his own voluntary act, and not by the necessary operation of any of the perils insured against."—(P. 351.) * *

"It has been suggested that the time of the detention to refit was longer than the actual voyage to Havre, and, therefore, that the master might reasonably refuse to proceed on the voyage. But the underwriters take upon themselves no risk whatever as to the length or duration (and it might be added, or of the cost) 'of the voyage insured.' What they undertake is, that, notwithstanding any of the perils insured against, the ship shall be capable of performing the voyage, so as to earn the freight insured; not that the voyage shall be performed in a longer or shorter period, or at a cost less than the freight to be earned." "The owner takes upon himself the chances of a short, or of a protracted passage, of a profitable or of a losing voyage."

(*Anderson v. Walter*, 2 Maule & S. 240; *Eruth v. Smith*, id. 278; *Benson v. Chapman*, 6 Mann. & Granger, 792, and the judgment of the Court of Exchequer on reversing it, as stated in *Arnold on Insurance*, Perkins's ed., vol. 2, p. 1143 [marginal]; id., pp. 1042 to 1052, and 1136 to 1139, and cases there cited.)

2 H. & C. 696.

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The cases seem to establish the proposition that, in an insurance on freight against actual total loss only, the underwriters are not liable, where the vessel is not so injured as to amount to a constructive total loss, and the cargo is not so injured as to prevent some part of it from being carried and delivered at the port of destination. In this case, a part of the cargo might have been retained and carried forward in the *St. Patrick*, the freight on which amounted to £251 16s. 5d. The value of this part of the cargo is not stated, but it consisted of 153 bales of cotton, 231 bbls. of turpentine, a lot of headings and shooks for casks, 197 tierces and 100 half-barrels of beef, 17 hogsheads, 1 tierce, and 254 barrels of pork.

The freight on this was actually earned by the transshipment and delivery of this part of the cargo, by the assured, or their agent. The only ground on which an actual total loss of this freight is claimed is, that it cost more than its amount to earn it; and that in the intendment of the assured the voyage was abandoned, which was commenced on the 6th of October, notwithstanding the vessel was repaired in a reasonable time, with a view to proceed to the original port of destination, and did so proceed with a full cargo, and earn and receive freight.

It is confidently believed that no authority can be found to support the proposition that, in the case of an insurance against actual total loss only, the underwriters can be made liable on the ground that injuries from the perils insured against have caused so much damage to the cargo, that it will cost more to put it in a condition to be reshipped and carried forward, than the amount of the freight payable on its delivery, where the vessel can be repaired in a reasonable time to prosecute the voyage, and at a cost which makes it the duty of the assured to repair her.

It has already been observed that the learned judge, who gave the only opinion pronounced when this cause was before the Court of Appeals, regarded it as a fact admitted by the demurrer, that there was an absolute "relinquishment of the voyage, and not a mere intermission, or suspension of it, for the purpose of repairs." But he also said that there was no right to relinquish it by reason of the injuries sustained by the vessel, unless they extended to at least one-half of her value.

They did not equal a quarter of one-half of her value, and, therefore, if there was a pretended abandonment of the voyage, it was not rightful as between the assured and the underwriters, if abandoned merely on account of the injury to the vessel.

It has also been noticed that that opinion proceeds on the ground, that the insurance was not on the whole freight, of the whole cargo, as an integral subject, but on each of the items of freight payable on the delivery of the distinct portions of cargo shipped.

Even if that be a correct exposition of the nature of this policy, the defendants on this motion are entitled to have it regarded as an insurance on the whole freight as a totality. Such was the rule declared at the trial, and to hold otherwise now, would deprive the defendants of the benefit of an exception, which they might have taken to such a ruling, if it had been made at the trial.

The learned judge whose opinion has been adverted to, throughout the opinion, and in considering the statements made by the declaration and admitted by the demurrer, as to the fate of the different portions of the cargo, treated the voyage as having been actually and absolutely abandoned, by injuries to the vessel, susceptible of being proved, under the allegations in the declaration, to amount to a constructive total loss of the vessel. In treating of the question whether there was a total loss of freight on the jettisoned goods, he says: "In this case, however, the assured never had any valid claim to a contribution for the loss of freight on the jettisoned goods, for two reasons: first, no freight *pro rata itineris* had been earned; and secondly, the ship never proceeded to her port of destination."

Contrary to the allegation admitted by the demurrer, it appeared on the trial, that the ship was not only repaired in a reasonable time, at a small expense, but in point of fact did proceed to her port of destination, with a full cargo, the freight on which was over \$10,000, while the original freight list was but a little over \$8000, and delivered the new cargo and received the higher freight.

He adopts the rule laid down in Abbott on Shipping, that

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"if part of the cargo be thrown overboard for the necessary preservation of the ship, and the remainder of the goods and the ship afterwards reach the place of destination (or delivery), the value of this part is to be answered to the merchant by way of general average, and the value of the freight thereof allowed to the owner."

He adds: "In the case under consideration, the vessel never reached any port of rightful or actual delivery, or a port of discharge."

How far this fact, assumed to be admitted by the demurrer, affected, in his judgment, the merits of the question, it is not proper to undertake to say.

But inasmuch, as on the facts proved on the trial, that opinion holds that the voyage could not be rightfully relinquished, and as it was shown that the ship did actually repair in a reasonable time and sail for and safely reach her port of destination with a full cargo, at an increased freight, it may be justly said that nothing in that opinion controverts the proposition, that in judgment of law, the voyage was not abandoned, but on the contrary was actually performed, and the assured earned and received full freight.

The policy, on the sixth of October, 1846, attached upon the freight on a voyage at and from New York to Liverpool. It is by no means a clear proposition that it attached to the freight on that particular cargo with which the ship sailed, in such a sense, that the underwriters would be liable if that cargo was wholly lost, provided the vessel actually completed the voyage with a full cargo, and earning full freight. (1 Story C. C. R. 350-351; 2 Maule and S. 278, 284, 286, and *Barclay v. Sterling*, 5 id. 6.)

With respect to the goods which were so damaged that they were sold, it appeared at the trial, that the assured, in paying over the proceeds of this part of the cargo to the owners of it, by arrangement with them retained half of the freight on the condition that if he recovered in this suit, he was to pay the amount retained for freight to the owners of the goods sold, and if he failed in this action it was to be in full satisfaction of his freight on that part of the cargo. The amount so retained was \$2,495.81. He has actually earned and received so much

freight on the damaged goods, unless the judgment of the law is that the loss was actually total, then he is to pay this over, and will not have earned any freight.

This fact did not appear in the case as it was presented to the Court of Appeals, and what that court would deem its legitimate effect, upon the rights of these parties, is not intimated in the opinion referred to.

It is quite obvious that very important facts were established at the trial, directly opposite to those which the Court of Appeals deemed to be admitted by the demurrer, and the case as it is now presented cannot be regarded as having been passed upon by that court.

One important question undoubtedly is: Is this policy one upon the whole freight as an integral subject, or is it one upon the items of freight upon the distinct shipments of cargo?

At the trial, the former was held to be its true construction. It is a valued policy, without prejudice to prior or subsequent insurance on actual freight. The freight was valued at \$10,000, and the "policy proof of interest." By the policy the defendants were not to be liable for any partial loss whatever, nor for general averages and expenses.

It would seem to have been the obvious intention of the parties, that the defendants were to pay the stipulated sum in case of a constructive total loss of freight on that voyage by the perils insured against, and that there was to be no liability, unless the assured was prevented by the perils insured against from entitling himself to any freight.

I deem the following propositions free from reasonable doubt:—

The injuries to the ship did not amount to a constructive total loss of the ship, and the plaintiffs had no right to abandon the voyage on that account.

The ship was repaired within a reasonable time for resuming and completing her voyage. She was repaired with a view to, and did proceed to her original port of destination. It was the right of the plaintiffs to have retained the undamaged goods, and carried them forward in this ship. Had they done so, there could have been no recovery in this action, for the reason that some freight would have been earned. Their not earning it,

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resulted from their own voluntary act, and not from the perils insured against, and therefore the underwriters are not liable.

That although injuries may arise from the perils insured against, which make it cost the assured more to earn the freight, than the amount of the freight, yet if they do not disable him from earning freight, the underwriters are not liable. They undertake nothing in respect to the profitableness or duration of the voyage. Their liability does not depend upon and cannot be affected by either of those considerations.

They merely contract that the assured shall not be prevented by the perils insured against from earning any freight, and if he is, they will pay, in case of a valued policy like this, the sum at which it is valued.

If these propositions are correct, the verdict cannot be sustained, but must be set aside, and a new trial granted.

As to some of the other propositions discussed on the argument, there is more room for doubt.

I think, that in judgment of law, the voyage commenced in October was completed. The ship was repaired with an actual intent, at the time of repairing her, of proceeding to the original port of destination. She was so repaired, and sailed for it, within a reasonable period for resuming the voyage. She carried a full cargo, and earned and received the freight of it. Whether mentally abandoned or not, it was actually completed. The freight of a full cargo, on that voyage, was earned. (1 Story's C. C. R. 350, 351; 2 Maule & Selwyn, 278; *Stirling v. Barclay*, 5 id.)

In the latter case there had been an abandonment to the underwriters on freight, and the question was, whether the latter were entitled to the freight of new cargo taken on board at an intermediate port, a port of necessity. It was held that it was freight earned during the voyage, and would be covered by the policy, and being such they were entitled to it. It would seem to follow that if the insurance had been against actual total loss only, the earning of such freight would exempt the underwriters from liability.

Freight upon the damaged goods was paid to the amount of \$2,495.81.

The plaintiff was allowed to retain this sum out of the pro-

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ceeds of the sales of the damaged goods, upon his assertion of a claim to full, or some freight, as a matter of right. He was allowed to retain it as a satisfaction of his claim to such freight. It does not depend upon the will of either of the parties to that arrangement, whether he shall keep it or not. But by the arrangement between them it is unconditionally his, unless this court decides that notwithstanding that arrangement, there was a total loss of freight on the part damaged, which he might, but preferred not to, entitle himself to. If the court decides that the freight on the undamaged goods was lost by his own voluntary act, and not by the perils insured against, and that, therefore, the defendants are not liable, then he has received, besides the freight on those goods, \$2,495.81, paid to him as freight, on a claim of freight actually earned by him on that voyage, and in satisfaction of such claim.

The rule seems to be that the freight, which but for the jettison the ship-owner would have received for the goods jettisoned, must be made good to him by a general average contribution. (Phillips on Ins. 91; Benecke's Pr. of Indem. 178; *Columbian Ins. Co. of Alexandria v. Ashly et al.*, 13 Peters, 344.)

We all concur in the opinion that there should be a new trial, on the grounds that the freight on the undamaged goods was not lost by the perils insured against, but by the voluntary act of the assured; and that the policy was a policy on freight as a totality.

These points being of themselves sufficient to dispose of the case, as it is presented by the bill of exceptions, it is unnecessary for the court, and it does not intend to express a definite opinion upon the other questions arising upon it.

HEUBACH BROTHERS v. ROTHER & MOLLMANN.

A remittance by a factor to his consignor is at his own risk, unless made under a prior direction or authority.

When he has been directed or authorized to remit, he is answerable only for good faith and due diligence.

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The guaranty of a *del credere* commission is limited to the payment of the price of goods sold upon credit, and does not extend to the remittance of funds received.

But when, by the agreement of the parties, the factor is entitled to charge a guaranty commission upon exchange remitted, he cannot discharge himself from his liability by omitting to charge the commission.

When a factor charges himself, by anticipation, with the price of goods sold upon credit, the remittance then made by him is of his own funds, in discharge of a personal debt, and is therefore made at his own risk.

Semble, that the weight of authority is, that a factor, who endorses generally the bills which he remits, renders himself personally liable, upon his endorsement, to his principal, as well as to third persons.

Report of referee in favor of defendants set aside, rule for reference discharged, and new trial ordered.

(Before DUKK and CAMPBELL, J.J.)

April 28; July 2, 1853.

MORRIS, on behalf of the plaintiff, upon a case to set aside the report of a referee, and the judgment entered thereon at special term, in favor of the defendant.

As the questions that arose, and were decided by the court, turned partly upon the pleadings, it is deemed proper to set them forth *in extenso*.

The following are the complaint, answer, and reply:—

The plaintiffs complain against the defendants, and state, on information and belief, that the plaintiffs, before the eighteenth day of November, 1847, employed the defendants to sell certain goods and merchandise of the plaintiffs, of the value of four hundred and eighty dollars or thereabouts, for reward to the defendants in that behalf, and then delivered said goods and merchandise to the defendants; and the defendants then promised to sell said goods and merchandise, and to be responsible to the plaintiffs for the price thereof.

And the plaintiffs further state, on information and belief, that after said goods and merchandise were so delivered to the defendants, and on or before the said eighteenth day of November, 1847 (but on what particular day or days they are not informed and cannot state), the defendants sold said goods and merchandise for the sum of four hundred and eighty dollars and two cents, on a credit of six months from the day or days of such sale; and that although such credit has long since expired, and the defendants have received the price of said goods

and merchandise, yet they have not paid the same nor any part thereof to the plaintiffs.

And the plaintiffs admit that the charges of the defendants for commissions and expenses, in and about such sale or sales, amount to the sum of fifty-four dollars and eighty-two cents; which sum the plaintiffs are willing, and hereby offer, to allow to the defendants out of the price of the said goods and merchandise.

And the plaintiffs further state, on information and belief, that the price of said goods and merchandise (after deducting said charges) became due and payable to the plaintiffs by the defendants, on the 14th day of April, 1848.

And the plaintiffs demand judgment against the defendants, for the sum of four hundred and twenty-five dollars and twenty cents, with interest from the 14th day of April, 1848.

The answer of the above named defendants to the complaint of the plaintiffs in this action, respectfully shows—

That the defendants admit that they were employed at or about the time for that purpose mentioned in the complaint to sell certain goods and merchandise, of the value of \$472.14, or thereabouts, and not of the value of \$480, as stated in the complaint, for reward to the defendants as commission merchants; and the said goods and merchandise were delivered to the said defendants; and the said defendants, as commission merchants, promised and agreed to sell the same in good faith, and remit the proceeds by a bill of exchange of a person or persons in good credit, but deny that they, the defendants, promised to be responsible for the price thereof. The defendants further answering, say, that they admit that afterwards, to wit: on or about the 18th day of November, 1847, the defendants sold said goods and merchandise, for the sum of \$472.14, and not as stated in the said complaint for the sum of \$480.02, on credit of six months from the day or days of such sale. And the defendants further say, that their charges for commissions and expenses thereon, in and about such sales, amounted to \$54.43, and not \$54.82, as stated in the complaint, leaving a net balance of \$417.71.

And the defendants further answering, say, that besides the bill of goods above mentioned, they collected a small bill,

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amounting to \$7.88, from Messrs. Gillespie, Moffat & Co., of Montreal, for and on account of the said plaintiffs, five per cent. commission on which said last mentioned sum, for the costs and charges of these defendants in and about the collection whereof, these defendants neglected to charge by inadvertence; which said last named commission, amounting to the sum of thirty-nine cents, has been added by the plaintiffs to the sum of \$54.43, being the amount of the commissions of the defendants first above mentioned, and allowed by them to the said defendants, included in the sum of \$54.82, stated in the complaint as the amount of defendant's commissions.

And these defendants further answering, say, that at and previous to the time of their receiving the said goods and merchandise, they received instructions from the plaintiffs to sell the said goods on credit or for cash, and to remit the proceeds by a bill of exchange, drawn by persons in good credit.

And these defendants further say, that on or about the 17th day of November, 1847, they, the said defendants, with the said balance of \$417.71, together with the said sum of \$7.88 collected as aforesaid from Messrs. Gillespie, Moffat & Co., of Montreal, less thirty-nine cents for commissions, purchased and remitted to the plaintiffs a bill of exchange, drawn by J. C. Muller & Co., of the city of New York, merchants, a house then in good credit, dated that day, directed to Mr. Jos. Chr. Muller, of Bremen, payable sixty days after sight, to the order of Messrs. A. Rolker & Mollmann, for 546 63.73 Bremen rix-dollars, and by them endorsed, by which said endorsement the said bill was made payable to the order of Messrs. Gebr. Heubach (or Heubach Brothers), a firm at Sonnenberg in Germany, composed of the plaintiffs; that they, these defendants, made the remittance aforesaid, before the said credit on which the said goods were sold, as aforesaid, had really expired; and this they did as an act of accommodation to the plaintiffs, as they, these defendants, had previously done in other cases with which the plaintiffs were well satisfied. That the said bill of exchange was remitted by the transmission to the plaintiffs of the first of the set. That the same was received, and the remittance approved by the plaintiffs, who endorsed the said bill of exchange with their name of Heubach Brothers; and

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the said bill of exchange, on the sixteenth day of December, 1847, was duly accepted by the said Jos. Chr. Muller, as by the same will appear.

That after the bill was purchased, the defendants discovered that they had omitted to deduct the interest to which they were entitled for payment or remittance by them in advance, to wit: the sum of \$10.61, which left the balance in favor of the plaintiffs of only \$414.98, and that the defendants, instead of remitting that sum only, had remitted, in fact, \$432.03, so that they in truth remitted \$17.05 more than the sum which they had to or were obligated to remit in the premises.

The defendants therefore deny that the sum of \$480.02, after deducting their charges, &c., or any sum, became due and payable to the plaintiffs by the defendants on the fourteenth day of April, 1848, or that the same or any part thereof is due from the defendants to the plaintiffs.

The defendants therefore pray that they may have judgment against the plaintiffs, for their reasonable costs, charges, and expenses, in this behalf wrongfully sustained.

The plaintiffs, for reply to the answer of the defendants, deny, on information and belief, that the house of J. C. Muller & Co., the drawers of the bill of exchange referred to in the answer, was in good credit at the time of the purchase of said bill by the defendants.

And they aver, on information and belief, that the house of Jos. Chr. Muller, the drawee of said bill, was not, at that time, in good credit; and that said house of J. C. Muller & Co., and said house of Jos. Chr. Muller, were composed wholly, or in part, of the same persons.

And the plaintiffs, for further reply, also deny, on information and belief, that the said bill was purchased or remitted for the accommodation, or with the funds of the plaintiffs, or by their authority, or that they ever approved the same; but they aver, on information and belief, that the same was so purchased and remitted for the accommodation and with the funds of the defendants; and that the plaintiffs duly repudiated and rejected the same, of which the defendants had due notice.

And the plaintiffs, for further reply, also deny, on information and belief, that the defendants had previously, in other

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cases, by the authority, or for the accommodation of the plaintiffs, in like manner purchased and remitted bills of exchange to the plaintiffs, as stated in the answer; or that the plaintiffs had notice that any such remittances were made with the funds of the defendants; or that the plaintiffs were well satisfied with any such remittances. And they aver, on information and belief, that if any such remittances were ever made, the same were so made by the defendants for their own accommodation, and without notice to the plaintiffs that the same were made with the funds of the defendants.

The action having been duly referred to Benjamin D. Silliman, Esq., as sole referee, was brought to trial before him on the 23d and 24th days of May, 1851.

The following facts, having been agreed upon by both parties, were received in evidence without proof, viz:

The plaintiffs are merchants and manufacturers, composing the firm of Gebruder Heubach (Heubach Brothers), and doing business at Sonnenberg, in Germany. The defendants are importing and commission merchants, composing the firm of A. Rolker and Mollmann, and doing business in the city of New York.

By agreement between the parties, the defendants were to act as agents of the plaintiffs, in the city of New York; and, as such agents, to sell all goods which should be consigned to them by the plaintiffs for sale, on the following terms, that is to say: the defendants were to receive 5 per cent. commissions for selling; $2\frac{1}{2}$ per cent. *del credere* commissions; and 1 per cent. exchange (*wechsels*) commissions; together with the customary charges for expenses, &c. Under this agreement the parties transacted business for a long time.

In the year 1847, the defendants were in possession of certain goods belonging to the plaintiffs, and which had been consigned to the defendants by the plaintiffs for sale; and which goods are described in the accounts of sale hereinafter mentioned. (Schedules Nos. 1 and 2.)

On or before the 17th day of November, 1847, the defendants sold all of said goods; and on that day they forwarded to the plaintiffs two accounts of the sales; copies of which ac-

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counts are hereto annexed, marked respectively, Schedules Nos. 1 and 2.

The defendants, also, on the same day, forwarded to the plaintiffs an account current, a copy of which is hereto annexed, marked Schedule No. 3.

The defendants, also, on the same day, forwarded to the plaintiffs the bill of exchange mentioned in the answer, a copy of which, with the endorsements, is hereto annexed, marked Schedule No. 4.

The defendants, also, on the same day, forwarded to the plaintiffs a letter, of which a copy is hereto annexed, marked Schedule No. 5.

At the time of the purchase and remittance of the said bill of exchange, the defendants had no funds in their hands belonging to the plaintiffs, except the sum of \$7.49, being the first item contained in said account current, Schedule No. 3.

The bill of exchange was received by the plaintiffs, and by them endorsed as appears on the bill, and thereupon forwarded by them to their agents at Bremen, for collection. It was accepted by the drawee.

In January, 1848, the said drawee became insolvent; and the said bill was thereupon, to wit, on the twenty-second day of January, 1848, presented to him, and security demanded, which was refused, and the bill was protested for want of such security. The plaintiffs, thereupon, to wit, on the 27th day of January, 1848, forwarded said protest to the defendants, inclosed in a letter, a copy whereof is hereto annexed, marked Schedule No. 6; which letter and protest were received by the defendants.

At maturity, to wit, on the 23d day of February, 1848, the said bill was duly protested for non-payment. The plaintiffs thereupon, to wit, on the 28th day of February, 1848, forwarded the said bill, and said last mentioned protest to the defendants, inclosed in a letter, a copy whereof is hereto annexed, marked Schedule No. 7; which letter, protest, and bill were received by the defendants on or about the 1st day of April, 1848.

The letters, copies whereof are hereto annexed, marked

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respectively, Schedules Nos. 8, 9, 10, 11, and 12, were afterwards exchanged between the parties.

SCHEDULE, No. 1.

Account sales of Stoneware, sold for account of Messrs. Heubach Brothers, in Sonnenberg.

Sold at 6 months' credit.

No. 81.	1	cask, containing 57 m. slate pencils, at 67½ cents., - - - - -	\$38 47
88, 89.	2	casks, containing 100 m. colored marbles, damaged, 61.37, - - -	61 37
90, 91, 92, 93.	4	cases, containing each 30 dozen slates, 0 at 6—120 dozen at 51 cents, - - - - -	61 20
94, 95.	2	cases, containing each 36 dozen slates, No. 3—72 dozen, at 55 cents, - - -	39 60
96, 97.	2	cases, containing each 30 dozen slates, No. 4—60 dozen, at 65 cents, - - -	39 00
98-101.	4	cases, containing each 50 dozen slates, 0 at 6—200 dozen, at 57 cents, - - - - -	114 00
Due per average, 14th April, 1847, - - - - -			\$353 64

CHARGES.

Cartage and labor delivering, advertising, postage, and petties, - - - - -	\$5 15
Storage and fire insurance, 2½ per cent., - - -	8 88
Commission and guarantee, 7½ „ „ - - -	26 50
	\$40 53

Net, due per 14th April, 1848, - - - - - \$313 11
 To the credit of Messrs. Heubach Brothers, New York, November 15th 1847.

A. ROLKEE & MOLLMANN.

SCHEDULE, No. 2.

Account sales of stone goods, sold for account of Messrs. Heubach Brothers, in Sonnenberg.

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Sold at 6 months' credit.

No. 109, 110.	2 cases, containing each 30 dozen slates, No. 4—60 dozen, at 65 cents,	\$39 00
94.	1 case, containing 36 doz. slates, No. 3, at 55 cents,	19 80
104.	1 case, containing 30 doz. slates, 0 a 6, at 57 cents,	17 10
105, 106.	2 cases, containing each 30 dozen slates, 0 a 6—60 dozen, at 54 cents,	32 40
111.	1 case, containing 50 doz. slates, 0 a 6—at 60 cents,	30 00
Due per average, 14th April, 1848, - - -		\$138 30

CHARGES.

Cartage and labor delivering, advertising, postage, and petties, - - -	\$2 40
Storage and fire insurance, 2½ per cent., -	3 45
Commission and guarantee, 7½ per cent., 10 37	\$16 22
Net, due per 14th April, 1848, - - -	\$122 08

To the credit of Messrs. Heubach Brothers, New York,
November 18th, 1847

A. ROLKER & MOLLMANN.

Off this, the annexed account sales, already rendered, case 94, gross amount,	\$19 80
Less expenses, - - - - -	2 32
Remains net, per 14th April, 1848, - - -	\$104 60

SCHEDULE, No. 3.

Messrs. Heubach Brothers, in Sonnenberg, in account current with A. Rolker & Mollmann. With interest at 6 per cent.

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1847.		Crs.
March 24.	By invoice of one case slates, for Canada, fls. 19, 24. R	
	10 a 78½, - - - - -	\$7 88
	Less commission, 5 per cent., -	39
		<hr/> \$7 49
Nov. 17.	By net proceeds of marbles and slates, due pr. 14 April, '48, - - -	313 11
Nov. 17.	By net proceeds of slates, pr. 14 April,	122 08
		<hr/> \$442 68
		Drs.
Nov. 17.	To interest on \$435.19, from November 17 to April 14, 147 days, at 6 per cent., - - - - -	\$10 65
		<hr/>
Balance in your favor pr. date,	- - - - -	\$432 08
		E. E.
New York, November 17, 1847.		
	A. ROLKER & MOLLMANN.	
Off this, error as annexed, - - -	\$17 48	
Off 147 days' interest, at 6 per cent., -	43	
	<hr/>	\$17 05
Remains net, pr. 17 Nov. '47, - - -		<hr/> \$414 98

SCHEDULE, No. 4.

Exchange for L'dor. 546.63 gt.

New York, 17 November, 1847.

Sixty days after sight of this first of exchange (second and third unpaid), pay to the order of Messrs. A. Rolker & Mollmann, five hundred forty-six 63-72 Bremen rix-dollars, value received, and charge the same to account of shipment per Florian, as advised by

J. C. MULLER & Co.

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To Mr. Jos. Chr. MULLER, Bremen.

(Endorsed on face.)

Acc. 16 December, 1847.

Jos. Chr. MULLER.

(Endorsed on back.)

Pay to the order of Messrs. Heubach Brothers, value in account.
New York, November 17, 1847.

A. ROLKER & MOLLMANN.

Pay to the order of Messrs. Frege & Co., value in account.
Sonnenberg, December 11, 1847.

HEUBACH BROTHERS.

SCHEDULE, No. 5.

(A. Rolker & Mollmann, to Heubach Brothers.)

New York, 17th Nov. 1847.

We have the honor to send you this day account sales of stone goods, which have been sold so far, for your account, viz.:

Nos. 81 a 101 net, pr. 14 April, 1848, \$313.11

104 a 111 - - - - - 104.60

and also a statement of your account, closing with a balance in your favor, of \$414.98, due this day; and we remit you against it inclosed,

L'dor 546, 63 gt. on Jos. Chr. Muller of Bremen, making, a 79 ct. \$135.03,

for which you will please credit us, if found correct.

(The further contents of this letter refer only to general business matters, except the closing paragraph, viz.:)

We have made an error in our account sales of this day, by which our remittance amounts to something more than the balance; for which you will please give us credit.

A. ROLKER & MOLLMANN.

SCHEDULE, No. 6.

(Heubach Brothers, to A. Rolker & Mollmann.)

Sonnenberg, near Coburg, 27th Jan'y, 1848.

We are in possession of your honored letters of 4th March

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and 17th Novbr, last year; and we are this day under the unpleasant necessity to be obliged to inform you that the remittance by your last, of L'dor 546.63 on Jos. Chr. Muller, of Bremen, has been protested, as the drawee has declared his insolvency. We inclose the said protest, requesting you to be pleased to discharge us for this amount; reserving it to us to account to you later, for the protest charges, which amount so far to L'dor 3. (The further contents do not refer to the matter at issue.)

HEUBACH BROTHERS.

SCHEDULE, No. 7.

(Heubach Brothers, to A. Rolker & Mollmann.)

Sonnenberg, near Coburg, Feb'y 28th, 1848.

Confirming our letter of the 27th last month, we acknowledge receipt of your favor of the 14th last month.

(The beginning refers only to general business matters.)

We also inclose protest for want of payment of your last remittance of L'dor 546.63 on Bremen; according to which you will please credit us for L'dor 566, as follows.

Account of your remittance on Jos. Chr. Muller of Bremen, protested for want of payment:

Capital - - - - -	Ldor 546.63
Protest charges - - - - -	1.54
Commission in Bremen, $\frac{1}{2}$ per ct., - -	2.53
Postage, brokerage, and stamp - -	70
	<hr/>
	Ldor 552.24
	<hr/>
at 112 $\frac{1}{2}$ ctf.	620.20
Commission at Leipzig $\frac{1}{2}$ per ct., - -	2. 2
Protest of surety, 3 w ^t ., Postage, 7. -	3. 7
	<hr/>
	ctf. 625.29
	<hr/>

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	at 7 fl.	at 4 ctf.	f. 1095.27
Commission $\frac{1}{2}$ per ct.,	-	-	" "
Postages,	-	-	2.33
			<hr/> 1098 00

at 97 f. for L'dor 50 L'dor 566.00

which we have charged to-day to account of Messrs. A. Rolker & Mollmann in New York.

Sonnenberg, Feb. 23d, 1848.

HEUBACH BROTHERS.

SCHEDULE, No. 8.

(A. Rolker & Mollmann, to Heubach Brothers.)

New York, 4th April, 1848.

We acknowledge receipt of your favors of the 27th January and 28th February, which have reached us in quick succession, a few days ago. The first brings us protest of our last remittance of L'dor 546.63 on Jos. Chr. Muller of Bremen, on account of the insolvency of the drawee. To our regret, has the house here, drawers of the bill, also suspended payment, in consequence of said failure, and is required to liquidate; from which reason we cannot do any thing in this matter for the present. A statement of their affairs we have not seen yet, as all depends on the realization of the shipments in Europe, and in particular on the house in Bremen. The character of the house has been always very respectable, and it has here immediately given every thing in trust of an assignee, Mr. Koop, of the firm of Koop, Fischer & Co., which will guarantee to the creditors that the actual proceeds will be divided. But in particular, the winding up of the affairs of J. C. Muller & Co. of Bremen, has to be awaited, in order to see for how much the business here remains responsible, as the said bill of exchange has been accepted there. As far as we hear, the estate in Bremen promises to give about sixty per cent. We have sent, by this steamer, the bill of exchange to Johs. Heckermann, of Bremen, with orders to remit to you the net proceeds of it;

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and you will please to give to this, our mutual friend, all further instructions which may be required. In conformity with the laws here, you get from the house here ten per cent. damages, added to the amount of the bill, instead of actual protest charges; which you will please note. We regret it very much that, by having bought this bill of exchange, we have brought you to loss; but we can assure you, as you will hear upon inquiry, that the house has had a good reputation in November, which sold its bills of extensive amounts, always in the market, and the failure of which was caused by the fall of cotton prices, originating in England; so that there is no neglect on our part. We have even been obliged to pay for this bill of exchange a little higher than the rate of exchange of that day, as J. C. Muller and Co. were the last who drew, and they felt easy and strong.

: To meet the doubts which might spring up, whether we did not express, by our endorsement, that we also guaranteed the bill, we refer you to the first letter of our correspondence with your hon. house, of the 20th April, 1836, in which we stated, in reference to consignments, that in conformity with the use here, for the commission of exchange guarantee one per cent. was charged, besides the 5 per cent. commission and 2½ per cent. guarantee on sales, and which we never have charged you, and which you have never claimed, just as much as we did not guarantee our remittances for collections for order goods, which only gave us 5 per cent. commission for orders. (The remainder of this letter does not refer to the matter at issue.)

A. ROLKER & MOLLMANN.

SCHEDULE, No. 9.

(Heubach Brothers, to A. Rolker and Mollmann.)

Sonnenberg, near Coburg, May 14, 1848.

We come just now in possession of your letter of the 4th ultimo, and we wonder very much to see brought forward by you, principles which are indeed quite new, and to which we can indeed not agree at all. It is true you refer, for maintain-

ing this principle, to your letter of the 20th April, 1836, but also therein is no stipulation which would release you from the responsibility to be accountable for the payment of your remittances, as you ask (*bedingen*) therein 5 per cent. sales commission of the amount of sales (*Erlöses*) $2\frac{1}{2}$ per cent. *del credere*, and one per cent. exchange commission; of exchange guaranty, no word is mentioned in it, which also would have been a singular (*sonderbar*) pretension if you would claim for your own remittances a compensation of a particular guaranty. As it is, we should think, self-understood, and it is also acknowledged in all the wide commercial world, that by charging $2\frac{1}{2}$ per cent. *del credere*, the commission merchant (*der Comsignee*) is not only responsible for the correct payment of the sales made, but has also, in particular, to liquidate (*abgemachren*) this amount punctually and correct; by which course the responsibility of the *del credere* is only fulfilled. But it would be quite a new discharge of this responsibility, if we should suffer the loss, as you pretend it with your last protested remittance, which originates from the insolvency of the seller of your bill. In conformity with the stipulations of common justice (law) adopted by the whole world, as also with the use of commerce, you are our debtor as soon as you have collected money for us; has the collection once been made, then there is even no necessity of a *del credere* before being charged, as you have done it always; and it follows, consequently, that if your remittances are not paid, we are entitled and in the right to return them to you for discharge (release) and to demand other better remittances. The matter is so simple and plain,—requires so little explanation,—and we always had so much confidence in your judgment and your feelings of justice, that we really wonder how you can charge to us the loss which arises out of the insolvency of the seller of your remittance, as we can demand according to common and exchange law, through the protest, the immediate payment of the bill and all charges, without concern to us what has caused the non-payment of your remittance, if we have not neglected anything otherwise; and therefore we cannot explain it to us that you have misunderstood your own stipulation in your letter of the 20th April, 1836, and define wrong the one per cent. exchange

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commission, which signifies nothing more than commission for procuring the bills: That you have not charged them does not release you from guaranteeing your remittances. And therefore we must insist on it that you make us, by return mail, remittances for the full amount of the bill of exchange; and we hope that by doing so, you will not force us to measures which will terminate the long business connexion between us, which we should regret very much. That therefore the failure in Bremen connected with your remittance does not concern us, is a matter of course; and we have therefore not given any instructions to Mr. Jos. Heckerman, in Bremen, and shall not do it. (The remainder of this letter does not refer to the matter at issue.)

HEUBACH BROTHERS.

SCHEDULE, No. 10.

(A. Rolker & Mollmann, to Heubach Brothers.)

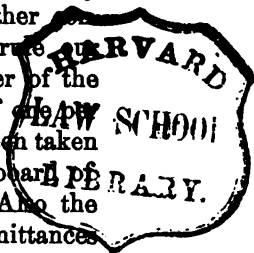
New York, July 8th, 1848.

We acknowledge receipt of your favors of 11th April and 14th May. With the former we received invoice, &c., which will be collected and remitted. The latter disputes the correctness of our position in regard to the remittance bought for your account on J. C. Muller, protested for want of payment. We regret it very much to see doubts arise in you in regard to the correctness of our statements, and the more as your Mr. Ernest Heubach has been a resident of the U.S., and New York, for a long time, where in the office counting house directory and yearly almanacs, as also in the shipping list, which is published twice a week, the rates of the board of commerce, of commissions acknowledged here, are published. We therefore send you inclosed, an extract made by the board of commerce concerning these rates, from which you will see the usance in existence in this place. You must allow us that we also differ from you, as if it was law everywhere, for instance a debt guaranteed in Frankfort, if we remit it sure to Sonnenberg; both is different in itself to guarantee a debt in a named place, and to keep it subject to order, or to remit a

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sum by bill or specie. Anyhow, our position on shipments of produce to the ports of Europe is the same as you are with consignments to New York. The commission for the sale is charged, and for time sales the guarantee for the payment of the money; for instance in Bremen the net proceeds are brought to the credit of the shipper (consignor), against which he draws or orders it on his own risk to another place, if he does not claim to have the amount remitted under guarantee against charge of the usual guarantee commission to this or that place. We do not deny, nohow, of having owed you the sales in New York; but by purchasing the bill, this debt ceases on proving that we have bought with due caution and according to our best knowledge and belief, the bill in this market being open for sale, and having it remitted to you. You have frequent intercourse with merchants from this country; even you find them often with you personally; who will be acquainted with the commission branch of business; or the first mercantile houses and consuls of the sea-towns may certify the correctness of this usance. A special or other contract of course goes before usance, but under this rule in connection does not come; on the contrary our letter of the 20th April, 1836, states explicitly, the commission of 1 per cent. at which rate the guaranty of bills would have been taken by us; and for the trouble of purchasing bills, the board of commerce allows half per cent. without guaranty. And the greater part of those who consign goods here cause remittances to be made them without having guaranteed them, not willing to pay the commission; anyhow such is the case with our correspondents; and as you have not demanded it that we should take the guaranty of the bills, although we had offered to do so, we have of course not done so.

But it appears from your letter, that you suppose the exchange guaranty, being included in the guaranty on sales, which is explained above, is not the case. Besides the usance of business in this place, does the law through our juries not bind the endorsement on a bill or note without having been paid a consideration for it, that is to say, without getting a remuneration for it. Nobody can be forced to take obligations; but the voluntary undertaking of obligations makes it binding



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by a consideration. Where this consideration has not been given, the endorsement may have been given out of accommodation, with the particular understanding that the endorser never shall be called upon to pay. In this way the law might interfere where no interference in the law has been intended; as the intention of the law is only to force those who do not fulfil their contract. The drawers of bills do not always like to draw to their own order, and require to do it to the order of the purchaser. On the contrary the purchaser of bills does not like to give the name of their correspondents in Europe, for the purpose not to expose the names for competition; from this cause, very often, bills not guaranteed are endorsed without making the endorsers responsible for the payment of them.

(The further contents do not refer to the matter at issue.)

A. ROLKER & MOLLMANN.

SCHEDULE, No. 11.

(A. Rolker & Mollmann, to Heubach Brothers.)

New York, June 19th, 1849.

We are since some time, without your letters; and we regret it very much that the guaranty on our remittance of November, 1847, caused an interruption in our intercourse; although in consideration of all sides, we cannot alter now the position we have taken in regard to it. We have sent said bill some time ago, to Mr. Johs. Heckerman, of Bremen, subject to your orders, who will have collected there a dividend and remitted it to you. Since, Mr. Heckerman has returned the bill to us, for the purpose of attending to the dividend here. We have first thought not to do any thing in the matter, but in order not to neglect any thing which might cause loss to you, we have, under approbation of the assignee, collected the dividend of ten per cent., as agents for you, amounting to \$47 52; and we remit you the same, inclosed a 72½ with L'dor 59 56, 3d. s. on C. L. Brauer & Son, Bremen, which you will please carry to the credit of the estate of J. C. Muller & Co.

A. ROLKER & MOLLMANN.

SCHEDULE, No. 12.

Heubach Brothers, to A. Rolker & Mollmann.)

Sonnenberg, 13th July, 1849.

We are in possession of your letters of 19th March, and 19th June, the latter containing L'dor 59 56, on C. L. Brauer & Son, Bremen, which we return to you to our release, as we cannot accept it under existing circumstances, it being the proceeds of a dividend from the estate of J. C. Muller & Co., from which we do not look for any thing, as we have already communicated to you, under date 14th May, last year; and in conformity with that communication, we have accepted nothing from Mr. Johs. Heckerman, of Bremen, what refers to said matter.

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Several witnesses were examined and depositions read on the part of the defendants, but as the testimony related chiefly to the standing and credit of the firm of J. C. Muller & Co., by whom the bill remitted by the defendants was drawn, none of it has any bearing upon the questions decided. It is wholly omitted. The referee made the following special report:

In this case, I find as matters of fact, that the defendants, merchants in New York, as agents of the plaintiffs, who are merchants at Sonnenberg, in Germany, sold certain merchandise for the plaintiffs on or before the 17th November, 1847, the net proceeds of which, amounting to \$442.68, would not be due until the 14th April, 1848; that, on the 17th November, 1847, the defendants, with money of their own, bought a bill of exchange for this amount, less interest from the 17th November to the 14th April, and remitted the same to plaintiffs, in payment of the said sales, and before the said sales became due; that said bill was drawn by J. C. Muller & Co., of New York, on J. C. Muller, of Bremen, payable 60 days after sight, to order of defendants, and was by them endorsed to plaintiffs in these words, "Pay to the order of Messrs. Heubach Brothers, value in account,—New York, November 17th, 1847,—A. Rolker & Mollmann." That said bill was protested for non-payment, and notice of protest was sent by plaintiffs to defendants in a

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letter, dated at Sonnenberg, January 27th, 1848, in which the plaintiffs claimed that defendants should pay them the amount.

The plaintiffs insist, that the defendants, having purchased the bill with their own funds and not with the funds of the plaintiffs, the former are bound to make good the amount; according to the principle laid down in *Hayes v. Stone et al.*, 7 Hill, 128; *S. C. in error*, 3 Denio, 575.

In that case, however, the defendants had the plaintiffs' funds in their hands, and instead of using them in the purchase of a bill, made such purchase on their own credit, with their own note, on time, and at a rate higher than for cash; and although they debited their correspondent only with the price for which the bill could have been bought for cash, yet the courts held that the defendants had placed their own interests in conflict with those of their principals; and that they probably would not have purchased the particular bill, but for the opportunity of getting it on credit; thus enabling them to use the plaintiffs' funds for their own purposes, and in effect pay the plaintiffs by the note of the defendants. The leading opinion given in the Court of Errors, puts the decision on the ground stated by Judge Story in his work on agency, sec. 210, that "it is a rule of general application in regard to duties of agents, that in matters touching the agency, they cannot act so as to bind their principals where they have an adverse interest in themselves."

Now, the reason of the rule in *Hayes v. Stone et al.* does not seem to me to exist in the present case. I do not see that the defendants had any interest in conflict with that of their principals. On the contrary, in remitting the money before it became due, they acted with a promptitude which could not have been required of them. They had not, like Stone & Co., the plaintiffs' funds in hand, nor did they, like Stone & Co., buy the bill on credit and give for it their own note.

It is objected by the plaintiffs that the drawers of the bill were not of the very highest repute; and that therefore the defendants have become liable, because they purchased the bill from a house of second rate standing. I think, on the whole, the fair inference from the testimony is, that although some other houses may have been of more distinguished responsibility, still the drawers of the bill were of good repute, and that the defen-

dants showed no want of care and vigilance in buying of them. It can hardly be objected that an agent is unfaithful because, Brown Brothers & Co. being the most wealthy drawers of exchange, he purchased of another house, which, though less wealthy, were esteemed good and responsible. Again, the defendants could have no possible motive for buying any other than the best bill. They would neither profit nor lose by the rate of exchange; whether the rate were higher or lower, would affect the plaintiffs only; but to the defendants it would necessarily be matter of indifference.

Again, the plaintiffs knew by the account sales and account current, that this bill was remitted to them in advance of the maturity of the sales; that it consequently was not purchased with their funds, but with the funds of the defendants. They should, therefore, have disclaimed the time and mode of payment if they were dissatisfied with it; instead of ratifying it, as, I think, under the circumstances they did.

It was also claimed by the plaintiffs that the defendants were liable as endorsers of the bill. I think the notice of protest was sufficient to charge the defendants as endorsers if they were liable; but it strikes me that their endorsement of the bill did not render them liable to the plaintiffs. Judge Story lays down the rule very broadly in his text (Story on Agency, sec. 157) that where an agent endorses a bill or note, though known to be an agent, he becomes liable not only in respect to third persons, but also in respect to his principals. He partly retracts this proposition, however, in a note, in which he says, "In respect to the principal the doctrine may in many cases require to be qualified; for if as between him and the agent there was no intention to create a personal liability, it will not arise." In *Sharp vs. Emmet*, 2 Wharton's R. 288, it was held that, if an agent remits a bill in payment for goods sold on account of his principal, and endorses the bill, he does not thereby become responsible thereon to his principal, if he received no consideration for guaranteeing the bill, and does not expressly undertake to do so. My conclusion in the present case is, that the defendants received no consideration for guaranteeing the bill, and that they did not expressly undertake to do so. If the bill had been drawn directly to order of plaintiffs, I do not see that they

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could have objected that it did not bear the defendants' endorsement.

This case was thoroughly and very ably argued by counsel, but from the best consideration I have been able to give to it, I think the plaintiffs are not entitled to recover.

June 21, 1851.

B. D. SILLMAN,

Sole Referee.

Judgment was perfected for defendants on the report. The plaintiffs made a case, and appealed to the special term.

C. O'Connor, for plaintiffs, insisted that the judgment ought to be reversed and a new trial granted, mainly on the following grounds.

I. The bill of exchange remitted by the defendants was no discharge of the plaintiffs' demand, even if it was, in itself, a good bill. (*Stone v. Hayes*, 7 Hill, 128; S. C. (aff'd) 3 Denio, 575.) 1. The bill having been purchased by the defendants with their own money, was their property, and they could not compel the plaintiffs to receive it on account or in payment of the demand. (a.) The defendants were liable to the plaintiffs for the proceeds of sales, only at expiration of the credit given. The *del credere* commission bound the defendants as guarantors of the purchaser, but did not make them primarily liable. (Story on Agency, § 33, note 2.) (b.) The bill, treated as a volunteered advance by defendants to plaintiffs, is not governed by the agreement, and the relations of the parties to it must be determined by the circumstances of the remittance itself. These showed the bill to be the property of the defendants, tendered by them to the plaintiffs as a payment, with the guaranty of their endorsement. Such a transaction is always a payment *sub modo*. (*Jones v. Savage*, 6 Wend. 662.) 2. The plaintiffs (even supposing they had sufficient notice of the facts) did not receive the bill both without recourse to the endorsers and as an absolute payment; nor did they (in the aspect claimed) ratify the acts of their agents, the defendants, in remitting the same. (a.) It is an elementary principle that where a creditor receives of a debtor the obligation of a third person, he takes the same

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merely as collateral; and the debtor is not discharged, unless the creditor expressly stipulates to that effect. (*Tobey v. Barber*, 5 John. R. 68; *Murray v. Gouverneur*, 2 John. Cases, 438; *Herring v. Sanger*, 3 id. 71; *Schermerhorn v. Loines*, 7 John. R. 311; *Johnson v. Weed*, 9 id. 310; *Hoar v. Clute*, 15 id. 224; *Van Eps v. Dillaye*, 6 Barb. S. C. R. 244; *People v. Howell*, 4 John. R. 296; *Olcott v. Rathbone*, 5 Wend. 490.) No such stipulation was given in this case. The plaintiffs never even acknowledged the receipt of the bill, except by returning it under protest. (b.) The fact that the bill was endorsed by the defendants, is evidence that it was not intended to be, and was not, in fact, received by the plaintiffs in payment. (*Monroe v. Hoff*, 5 Denio, 360.) (c.) The lapse of time before the return of the bill (only forty-two days) was not sufficient, under the circumstances, to raise any implication in favor of the defendants. (d.) Endorsing the bill, by plaintiffs, signified nothing. It was endorsed by defendants to order of plaintiffs, and could not be collected without plaintiffs' endorsement. (e.) The bill being payable in a foreign country, the plaintiffs were justified in holding it for payment, for the benefit of the defendants. 3. The plaintiffs had no notice that the bill was not purchased with their money; and their acts, therefore, of whatever character, could have no effect upon their rights. Ratification, to be effectual, must be with full knowledge; and the defendants, in order to charge the plaintiffs with having accepted the bill as their own, were bound to establish, at least, that the plaintiffs received the bill as their own, with full knowledge of all the facts. (Story on Agency, §§ 239 to 243; 1 Greenleaf's Ev., § 197.) (a.) The plaintiffs did not, in any way or manner, receive the bill as their own. (b.) All the facts being particularly and exclusively within the knowledge of defendants, they were required to give the fullest possible notice to the plaintiffs; more especially as the plaintiffs resided abroad, and the defendants were their agents. If any point was left open for inference, that inference must be against the defendants. (1.) The account current debits the defendants with the "net proceeds;" and the letter transmitted with it says, that the balance was due to the plaintiffs that day. This left the matter open to the inference that in some (unexplained)

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manner the defendants were actually in funds at the time they purchased the bill. (2.) The rebate of interest charged in the account current was no notice to the plaintiffs, because as the sales were made on credit, and, of course, at credit prices, the purchaser would have been entitled to the rebate if he discounted his paper, or paid the bill in cash. This is always allowed, if the purchaser desires; and, of course, it would be a proper charge against the plaintiffs. (c.) The plaintiffs were under no obligation to inquire as to the means by which the defendants came in funds. If the papers justified the inference, they had a right to draw it and repose upon it. 4. The defendants were bound to wait until they were actually in funds, before they took the risk of buying a bill to remit. If they had done so, this loss would not have happened. The drawers of the bill in question suspended payment before that time. (a.) When an agent, of his own motion, performs an act not within the line of his duty, he acts on his own responsibility. He cannot shield himself by claiming to have done more than his duty. If he has done something different from his duty, that is enough to charge him. The intent can be taken into account only where fraud of some kind is alleged. 5. The defendants entirely failed to prove any custom or course of business between the parties, which would authorize them to remit in advance of the actual receipt of proceeds.

II. The plaintiffs are entitled to recover against the defendants as endorsers or guarantors of the bill in question. 1. The defendants, by their agreement, were to guarantee their remittances, receiving therefor one per cent. commission. (a.) The commission was charged by the defendants, it being included in the general charge of $7\frac{1}{2}$ per cent. The commissions being charged in gross, the law will infer that this particular commission was included. (b.) If the commission was not charged, it would make no difference, as it was the defendants' mistake or fault, and not the plaintiffs'; and the plaintiffs cannot be prejudiced thereby. (c.) Under the circumstances, procuring the bill to be drawn to their own order, and endorsing it, is conclusive evidence that the defendants intended to guaranty the bill. (1.) They were under no obligation to have the bill made payable to their own order, unless they were to become guarantors.

(2.) They could have endorsed it "without recourse," if they wished to avoid liability. (3.) As they remitted in advance, it was their duty to guarantee the remittance; and, therefore, the duty and the act form satisfactory evidence of the intent. 2. The bill belonged to the defendants, and as they sought to transfer it to the plaintiffs, it must be presumed to have been for their advantage to do so. This advantage, whatever it may have been, was a sufficient consideration to uphold the guaranty. 3. The fact that the plaintiffs might refuse to receive the bill, except as collateral, unless it was guaranteed by the defendants, was a sufficient consideration for the guaranty. 4. The advantage which an agent derives by retaining the business of his principal, is a sufficient consideration to support a voluntary guaranty of a remittance. 5. No consideration beyond that necessarily arising from the relation of the parties, is required to sustain the guaranty of a bill remitted by an agent to his principal. The question is purely one of intention. (Story on Agency, §§ 156, 157, 269, and cases cited.) 6. The notice of protest was sufficient to charge the defendants as endorsers or guarantors. (a.) The bill was protested in Bremen, Feb. 23d. On the next day it was forwarded to the plaintiffs at Sonnenberg, and reached them not sooner than Feb. 26th. The 27th was Sunday, and on Monday, 28th, the plaintiffs forwarded the bill, with the protest, to the defendants. (b.) The former protest, for want of security, was notice to the defendants that the bill would not be paid.

III. The plaintiffs were not bound, when they returned the protested bill, to specify any grounds for their claim against the defendants; it was enough that the defendants were notified that the plaintiffs made a claim against them.

E. Sandford, for defendants.

I. The plaintiffs' alleged cause of action was that they employed the defendants to sell certain goods and to be responsible to the plaintiffs for the price thereof. That defendants sold them upon credit of six months, which has elapsed, and the defendants have not paid the price. The answer alleged that the goods were delivered to defendants to sell, and to remit

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the proceeds by a bill of exchange of persons in good credit. That they purchased the bill in question of a house then in good credit, and remitted it to the plaintiffs. That they made the remittance before the credit on the goods had expired as an accommodation to the plaintiffs. That it was received, approved of, and endorsed by plaintiffs. The reply put in issue only the allegations as to the good credit of the drawers, at the time of the purchase of the bill by the defendants, and the approval of the bill by the plaintiffs. The evidence warranted the findings by the referee, upon both of the issues.

II. The finding of these issues against the plaintiffs upon sufficient evidence, is conclusive upon the merits of the controversy; it being admitted by the plaintiffs that the defendants were to remit by bill of exchange, and the defendants having remitted a bill pursuant to their agreement, and plaintiffs having approved and accepted such bill, there is an end of the cause.

III. If any question had been raised whether the plaintiffs could have charged the defendants as endorsers of the bill of exchange, the decision of the referee on that point was warranted by the evidence, and by the law applicable to the case.

IV. The motion to set aside the report of the referee should be denied with costs.

BY THE COURT. DUEB, J.—The general rules of law applicable to this case may be stated in a few words.

When a factor has funds in his hands, belonging to a foreign correspondent, it is his duty, giving early information of the fact, to retain them, subject to the order of his principal, unless he has been previously directed or authorized to remit them. If he undertake to remit, when no such direction or authority has been given, the remittance is at his own risk; and consequently, when it is made by a bill of exchange, it is only the actual payment of the bill that can discharge him from his liability. On the other hand, when he has been directed, or has a discretionary power to remit, he acts, in purchasing a bill for that purpose, simply as the agent of his correspondent, and is then responsible only for good faith and due diligence. The remittance of the bill, when it appears that it

was purchased in good faith, and upon due inquiry, operates as between him and his principal as an absolute discharge, and the risk of the dishonor of the bill is cast wholly upon the latter, who, in that event, can look only to those whose names are on the paper.

Since the decision of the Supreme Court, in *Leverich v. Meigs* (1 Cow. p. 645), the law in this State must be regarded as settled, that the rules which have been stated apply, as well to a consignee under a *del credere* commission, as to an ordinary factor; although I apprehend that the law is certainly otherwise on the continent of Europe, and probably in England. Such a commission gives of itself no authority to remit; and when that authority is given, the guaranty which the *del credere* imports is limited to the due payment, by purchasers, of the price of goods sold upon credit, and does not extend to the remittance of funds actually received. These general rules may be varied, as in other cases, by the special agreement of the parties. The consignee, or factor, may agree, with or without an addition to his ordinary commission, to guaranty all the remittances which he makes, or his authority may be limited by the instructions of his principal, and then he is only exonerated when the prescribed limits or conditions are observed. To which I add, that, whether he acts with or without authority, he may, in all cases, render himself personally liable, not only to third persons, but to his principal, by the form in which his remittance is made; that is, as drawer or endorser of the bills or notes which he remits.

The answer of the defendants in this case admits, that they received and sold the goods, to recover the price of which the suit is brought, as the agents and on account of the plaintiffs, but sets up, as a principal defence, that they had been previously instructed, by the plaintiffs, to sell the goods for cash or upon credit, and to remit the proceeds by a bill of exchange, drawn by persons in good credit; and then avers that, in pursuance of this authority, they purchased and remitted to the plaintiffs a bill of exchange, drawn by a house in good credit, payable to the order of the defendants, and endorsed by them to the plaintiffs; and covering the whole balance due to the latter, as the proceeds of the sale. In fewer words, the defence

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is, payment by a bill of exchange, which the plaintiffs received, and were bound to receive, in full satisfaction of their claim.

It was insisted by the counsel for the defendants, that the only reply that has been made to the defence is, a denial that the drawers of the bill were in good credit at the time of its purchase; and certainly, were this the only issue raised by the pleadings, we could not hesitate to affirm the report of the referee, since we are by no means prepared to say that his finding upon this question of fact is against the weight of evidence. But, as we construe the pleadings, this is not the only, nor the most important issue which is raised. The reply, as we read it, contains a distinct and positive denial of the authority of the defendants, which we understand to mean their authority to purchase and transmit the bill in question, as the agents and at the risk of the plaintiffs. Hence, in order to sustain their defence, so far as it rests merely upon the purchase and transmission of the bill, the defendants were bound to prove that the instructions which they allege in their answer were, in fact, given, and that, by their fair construction, they embraced and warranted the remittance, upon which they rely as an absolute discharge.

The first inquiry, therefore, is, whether this necessary proof has been given; and the reply must be that assuredly it has not, unless it is contained in the terms of the agreement, under which it is admitted that the original connexion of the parties was formed, and their subsequent business transacted. This agreement is the only evidence bearing upon the question; and it does not appear, nor has it been pretended, that any instructions were ever given by the plaintiffs, by which its true import could be varied or enlarged. The terms of the agreement, it seems to us, are plain and unambiguous. The defendants agreed to sell the goods consigned to them by the plaintiffs, and remit the proceeds, charging a commission of five per cent. on sales, two and a-half per cent. *del credere*, and one per cent. exchange; and these commissions the plaintiffs agreed to pay. It is true it appears, from the correspondence of the parties, that they differed as to the proper application and effect of these commissions; the plaintiffs naturally supposing that the

law in this State was the same as in Germany, believed that the guaranty of the *del credere* covered remittances, while the defendants insisted that the *del credere* was confined to sales, and that it was by the exchange commission alone that their guaranty of remittances was meant to be compensated; but we regard this difference as in truth immaterial, since, accepting the interpretation of the defendants, it remains certain that, according to the understanding of both parties, the defendants were to guaranty the exchange which they purchased, as fully as the sales which they effected; and, in our judgment, the obligation thus created by the agreement was as positive and imperative in the one case as in the other. It is possible that the defendants had a discretion to remit immediately or wait the instructions of the plaintiffs: but if, without thus waiting, they chose to remit, we are clearly of the opinion they were bound to guaranty; in other words, that the agreement into which they had entered, and from which all their authority was derived, imposed upon them a duty, from which, by no act of their own, without the consent of the plaintiffs, could they be discharged. It could never have been the meaning of the parties, that the defendants might assume the risk of exchange, or cast it upon the plaintiffs, at their pleasure; such a construction of their agreement would be just as unreasonable in reference to the guaranty of exchange as to that of sales. We apprehend, however, that it has never been imagined, that a *del credere* agent may, in his discretion, guaranty or not the sales which he effects, and whenever, from any cause, he is unwilling to assume the risk, by relinquishing his commissions, cast it upon his correspondent. The object of the foreign merchant, in requiring a guaranty, as a general rule, would be wholly frustrated by vesting in his agent this unlimited discretion—a discretion, which, in a large majority of cases, would be certainly abused, and, in all, would be a direct temptation to negligence, dishonesty, and fraud. No man of common prudence would think of vesting it in an agent, and no agent of common sense venture to claim it; and so great is the improbability, that, in any given case, such was the understanding of the parties, that, in our judgment, it could only be overcome by uncontradicted evidence of an express agreement.

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In our opinion, the remarks that we have now made apply with equal force to a guaranty of exchange. In making it discretionary, there is the same danger of abuse, the same temptation to carelessness and fraud ; and, consequently, there are the same reasons for holding the obligation to be positive and universal, unless, by undoubted proof, it is shown to have been otherwise. There is nearly the same risk in purchasing exchange as in effecting sales ; and the testimony shows, that there is a wide difference, naturally affecting their market value, between bills of the first and of the second class. Those of the first are believed to be good ; they are those, in the language of one of the witnesses, in relation to which "not the slightest doubt is entertained." The solidity of the second is a matter of opinion, not of knowledge ; they are believed to be good, but no one will say that they certainly are so. Give to the agent the discretion that is claimed ; and the general mode of its exercise may be safely predicted. Bills of the first class will be covered by his guaranty, and the naked risk only of the second, be thrown upon the principal. The guaranty, when useless, will be given, and withheld, only when a just regard to the interest and security of the principal would render it of value. That the plaintiffs never meant to give to the defendants a power so liable to be abused, we are entirely satisfied ; nor is there any evidence that the defendants, until the dishonor of the bill, which is now set up as an absolute payment, claimed to possess it. By their own admission, the defendants agreed, for a commission of one per cent., to guaranty the exchange which they remitted ; and this stipulation, from its nature, attached itself to every remittance which they subsequently made, unless it can be shown that the plaintiffs, with a full knowledge of the facts, released them from its observance ; in other words, consented to accept the remittance as an absolute payment. The case, in our opinion, discloses no evidence whatever that the plaintiffs meant thus to adopt the remittance that is now relied on as a defence ; nor have any facts been proved, from which the defendants had the right, or we, as judges, are bound, to infer that such was their intention.

It is possible that the defendants meant that the remittance should operate as an absolute payment ; but it would be absurd

to suppose that their secret intention was alone sufficient to discharge them ; and we mean distinctly to say, that there is no evidence that this intention of the defendants, if it existed, was made known to the plaintiffs, and that it was with this understanding that they accepted the remittance.

It is seen from these observations, that we attach no weight to the fact upon which the defendants' counsel laid the entire stress of their argument, namely, that in the account of sales which accompanied the remittance the defendant omitted to charge an exchange commission ; for while we agree with the counsel that this omission is apparent upon the face of the account, we are compelled wholly to dissent from the conclusions that have been drawn from it. The argument is, that the defendants, by not charging the exchange commission, gave notice to the plaintiffs, that the remittance was not to be considered as protected by their guaranty ; and, consequently, that the plaintiffs, by retaining the bill, sanctioned the remittance as properly made, and dispensed with the guaranty, upon which they might otherwise have insisted. This reasoning is specious, but dissolves upon examination. An agent, who has bound himself to guaranty, may abandon, if he will, his right to the stipulated reward ; but he cannot, by relinquishing his commission, release himself from his obligation. He cannot, by his own act, rescind his contract, and cast upon his principal the risk which he had himself consented to bear ; and by holding otherwise, it is plain that we should give to the agent the very discretion which it has been shown that he ought not, and could never have been meant, to possess. Hence, the principal, when it is known to him that in a particular transaction the guaranty commission has not been charged, is not bound to infer that the agent meant, by the omission, to violate his contract ; but may well suppose, either that the omission was accidental, or that the agent was content with the commissions he would otherwise receive.

A principal, having any confidence in his agent, would never suspect that the omission was intended to deprive him of the security for which he had stipulated, and a court of justice, in holding such to be its effect, would, in our judgment, give its sanction to a fraud.

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If the defendants meant that the plaintiffs should understand that the bill which they remitted was intended by them as an absolute payment, they were bound to say so in the plainest terms; and even had this express communication been made, the plaintiffs would have been justified in replying, that they would retain the bill until its maturity, and, if then dishonored, would hold the defendants to their original guaranty. As no such communication was made, the reply was unnecessary, and their silence, whatever may have been the views of the defendants, is no evidence of their acquiescence. Hence, the allegation that the plaintiffs approved and adopted the remittance as made by their authority, and at their own risk, we cannot do otherwise than regard as groundless. The defendants, under their agreement, had no right to remit at all at the risk of the plaintiffs; and if such was their intention in the remittance, upon which they rely, we have no right to say that the intention was made known to the plaintiffs, far less that it was ratified by their subsequent conduct.

The result is, that the defendants either made the remittance under their original agreement, or without authority; so that, *quæcumque viâ data*; it was made at their own risk, and having failed, they must be liable. Nor is this all. Had there been no positive stipulation of guaranty on the part of the defendants, and had their instructions from the plaintiffs been exactly such as are alleged in their answer, we must still have held that the plaintiffs, under the special circumstances of this case, are entitled to recover.

The goods of the plaintiffs were sold on a long credit, and on the very day of the sale the defendants charged themselves with their price; and it was for the purpose of satisfying the balance, which, deducting interest and commission, was thus created in favor of the plaintiffs, that they purchased and remitted the bills, the dishonor of which has led to this controversy. Our opinion is, that this remittance was not made by them in their capacity of agents, nor covered by their supposed instructions; but, on the contrary, was a remittance which, upon well settled rules of law, unless it proved to be effectual, they were bound to make good. It was emphatically a remittance at their own risk, not at that of the plaintiffs.

For reasons that we shall not now attempt to explain, we exceedingly doubt whether a *del credere* agent may, in his discretion, charge himself immediately with the price of goods sold upon credit; but, admitting that, by his voluntary act, he may thus constitute himself the debtor of his principal, it is plain that the remittance which he then makes is of his own funds, not of those of his principal, received as the actual proceeds of the sale. It follows that the remittance is made by him, not in the necessary discharge of his duties, or in the proper execution of his trust as agent, but for the sole purpose of satisfying a personal debt, which, without necessity and without request, he chose to assume. It is a novel doctrine that a debtor may, in any case, by remitting a bill to his creditor, impose upon him the risk of its ultimate payment; and the doctrine is as unreasonable as it is novel.

Let it not be said that the principal, if not willing to treat the remittance as an absolute payment, is bound to return the bill, and makes it his own by retaining it. The conclusive answer is, that he is not bound to know, or even suspect, that his reception of the bill was intended to operate as an immediate payment; but, on the contrary, has the right to believe that the bill was transmitted only as a collateral security. As such, he is justified in returning it when it proves unavailable, and justified in then demanding payment of the debt it was remitted to cover.

In this State the law is settled, by a long series of decisions, that the acceptance, by the creditor, of the bill or note of a third person, can never be held to cancel an existing debt, unless it appears that, by the express agreement of the parties, it was received as an absolute and final payment.

In other cases, and even where a receipt in full has been given, the bill or note is held to have been received merely as a collateral security, which, unless realized, creates no bar to a subsequent recovery of the original debt. (*Toby v. Barker*, 5 John. 68; *Muldon v. Whitlock*, 1 Cowen, 290, 308; *State Bank v. Fletcher*, 5 Wend. 85; *Olcott v. Rathbone*, idem. 490; *Hays v. Stone*, 9 Hill, 128; S. C. in Error; 3 Denio, 575; *Van Eps v. Dillaye*, 6 Barb. 244.)

Upon the fullest reflection, we can perceive no ground for

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excepting the present case from the operation of these rules. Had the term of credit upon the sale of the goods expired, and the purchaser had then failed to pay, the defendants, by force of the *del credere*, would have been immediately liable; and none can doubt that a remittance, then made by them, to cover the price of the goods, would have been made for the purpose of satisfying their personal debt. We can make no distinction between a debt, which, by anticipation, they chose to assume, and a debt which would have been imposed upon them by the terms of their contract. In both cases it is equally true, that the funds remitted are not the actual proceeds of the sale, which, as such, the defendants, as agents, were bound or authorized to remit. In both, the funds are those of the agents, not of the principals.

We remark, in conclusion, that the reason why an exchange commission was not charged by the defendants is now apparent; making the remittance, not as agents, but as debtors, not under their agreement, but as a voluntary act, they had no right to charge the commission.

Believing, for the reasons that have now been stated, that the referee has erred, and that the judgment entered upon his report must therefore be reversed, we deem it needless to inquire, whether, if these reasons had not existed, it must not have been held, that the defendants had rendered themselves liable by endorsing generally, and not as agents, or without recourse, the bill which they remitted. It is sufficient for the present to say, that we are not to be considered as assenting to the propriety of the decision of the Supreme Court of Pennsylvania, in *Sharp v. Emmet*, 5 Wharton R. 288; but, on the contrary, are disposed to think that the position of Judge Story, "that when an agent, employed to purchase bills, makes them payable to his own order, and then endorses and remits them to his principal, he is liable thereon, as endorser, to his principal, as well as to third persons" (Story on Agency, sec. 269, 2d ed. page 332), is fully sustained by the authorities to which he refers. *Goupey v. Harden*, 7 Taunt. 159, is an express decision; and *Lefevre v. Lloyd*, 3 Taunt. 749; *Sampson v. Jevan*, 3 Camp. 291; and *Leadbetter v. Farren*, 5 M. & Sel. 345, involve the principle. There is doubtless an excep-

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tion, where, with the knowledge and assent of the principal, the agent endorses the bill, for the sole purpose of facilitating its collection ; and it was upon this exception, we think, the decision in equity, in the Court of Exchequer, in *Ridson v. Dilworth*, 5 Price, 564, must have proceeded. It is only by this explanation that the decision can be reconciled with the cases at common law.

It is doubtful whether the liability of the defendants, as endorsers, is a question properly arising under the pleadings ; and, if it exist, whether it can be otherwise enforced than in an action upon the bill itself. We therefore leave the question undecided.

The judgment at Special Term is reversed, and the order for a reference discharged, costs to abide the event. The cause must now go to a jury ; who, unless the case shall be materially altered by further evidence, must be instructed to find a verdict for the plaintiffs.

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That the plaintiff in an action for a *troit*, when the jury have improperly severed the damages, may enter his judgment against all the defendants for the largest damages found against any one of them, is an inequitable doctrine which the Court, unless constrained by the authorities, would refuse to follow.

Whether the authorities in support of the doctrine are conclusive the Court declined to consider, being satisfied upon other grounds that the judgment appealed from was erroneous.

To maintain an action for a malicious prosecution, the plaintiff is bound to prove the entire want of a probable cause for the accusation, and the actual malice of the defendant in preferring it—that is, malice in fact as distinguished from malice in law.

Malice, therefore, in all cases, when the cause turns upon its proof, is a question of fact to be decided by the jury.

But probable cause is, in all cases, a question of law, in relation to which the judge who tries the cause, is bound to express a positive opinion.

It is no more a mixed question of law and fact than every other question of law, which a judge in the course of a trial is required to determine.

If the judge who tries the cause is of opinion that the facts admitted or clearly

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established, are not sufficient to prove a want of probable cause, he must either nonsuit the plaintiff, or direct the jury to find a verdict for the defendant.

But if the facts, upon which in his judgment the question depends, upon the evidence are doubtful, he must instruct the jury, that if they shall be found by them in a certain manner, they do or do not amount to a want of probable cause. If, instead of such a direction, he leaves it to the jury to determine, not only whether the facts alleged by the plaintiff are true, but whether, if true, they prove a want of probable cause, he commits a fatal error.

The judge, in the case under hearing, instructed the jury to consider and determine whether the facts and circumstances known to the defendants were reasonable grounds for their believing that the charge which they had made against the plaintiff was true.

Held, that this instruction was erroneous, as necessarily involving a submission to the jury of the question of probable cause, the existence of reasonable grounds for believing the charge preferred to be true and of a probable cause for making it, being only different forms of expressing the same truth.

When the existence of facts constituting a probable cause is admitted or established, the presumption of law is that the defendant entertained and acted upon the belief which the facts thus known to him justified him in holding.

Hence, unless this presumption is repelled by proof on the part of the plaintiff, the question of the actual belief of the defendant ought not to be submitted to the jury.

The charge against the plaintiff was that upon the trial of a cause in which he was examined as a witness, and was a material witness—he had sworn falsely that he had no interest in the event of the suit. If such was his testimony, it was clearly shown that there was probable cause for believing it to be false; but the main controversy upon the trial was whether he had in fact sworn as the defendants in making the charge had alleged.

Held, that in order to justify the defendants, it was not necessary for them to prove that the plaintiff had sworn in terms that he had no interest in the event of the suit, but that their defence was established, if it appeared that he had sworn in substance, although not in words, that he had no interest that could disqualify him as a witness.

Held further, that it was proved by the plaintiff's own witnesses that such was the substance and necessary result of his testimony.

Held, that the existence of probable cause was therefore affirmatively shown, and consequently that the plaintiff ought to have been nonsuited, or the jury have been directed to find a verdict for the defendants.

Held further, that had the true and only issue been whether the language of the plaintiff, when examined as a witness, was exactly such as the defendants had represented, so great was the preponderance of the testimony to establish the fact, that upon that ground alone, a new trial must have been granted.

Judgment reversed, and new trial granted; costs to abide the event.

(Before DUEK, PAINE, and EMMET, J.J.)

May 10, 11, 12; July 2, 1853.

APPEAL by the defendants, Smith & Brush, from a judgment and order at special term, denying to them a new trial upon

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exceptions taken on the trial, and also upon the ground that the verdict was against evidence.

The action is for a malicious prosecution, and in its original form was not only against the present defendants, Smith & Brush, but also against Eugene Keteltas & Wm. A. Keteltas, and was first tried before Mr. Justice Vanderpoel and a jury in December, 1849, when the jury found a verdict against Smith, Brush & E. Keteltas for \$3,750, and under the direction of the judge acquitted Wm. A. Keteltas. A motion for a new trial was then made and denied (*Bulkeley v. Keteltas*, 4 Sand. S. C. R. 450). Upon an appeal, however, to the Court of Appeals, the judgment of this court was reversed, upon the distinct ground that the judge upon the trial, contrary to the request of the counsel for the defendants, had improperly submitted to the jury the question whether the plaintiff had shown a want of probable cause for the prosecution, and with a clear intimation of opinion, that a probable cause had in fact been established. The case is now reported (2 Selden, 384).

In consequence of this reversal, the cause was again tried before the Chief Justice and a jury in October, 1852, when by the direction of the judge the defendant, Keteltas, was acquitted.

The following are the material facts as given in evidence upon this trial:

Early in the month of August, 1848, the defendant, C. B. Smith, accompanied by the defendant Brush, upon a complaint in writing, applied to J. Lothrop, Esq., one of the police justices of the city, for a warrant against the plaintiff upon a charge of perjury, and exhibited in support of the charge his own and Brush's affidavits, also the affidavits of Wm. H. Bogardus and Wm. A. Keteltas. All these affidavits concurred in stating that on a recent trial of a cause in the Common Pleas, in which one Charles Bradley was plaintiff and Eugene Keteltas was defendant, the plaintiff Bulkeley, who was the attorney for Bradley, was sworn and examined as a witness, and testified that he had informed Bradley at the commencement of the suit that he would not charge him anything for his services, and that he did not intend to charge him even for attorney's fees; that he was not to receive any compensation for his services, and that

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he had no interest in the event of the suit. The trial in the Common Pleas was on the 7th of June, 1848; the verdict was rendered on the 8th—the verdict was in favor of Bradley for \$100—Smith and Brush both swore that the testimony of the plaintiff was so material that without it Bradley would not, in their opinion, have obtained a verdict. Smith also swore that Bulkeley had testified on the trial, that Bradley was then absent and had been so for several months, and that he had received no letters from him.

To prove that the testimony so given was false, Smith placed in the hands of the magistrate the following papers, which were proved to be in the handwriting of the plaintiff.

"SIR—Take notice, that my costs and counsel fees in this case have not been paid me by my client, and you are required not to pay the amount of the judgment recovered by the plaintiff herein, or any part thereof, to the plaintiff, until such costs and fees are paid me; also that I am specially authorized by the plaintiff to receive the am't of the judgment and costs recovered by him in this suit, and that any payment of the same to, or settlement or compromise with any person but myself, in any matter relating to the suit, will be wholly void.

"Yours, &c.,

"L. E. BULKELEY.

"To Eugene Keteltas and his attorney,

"N. Y., June 8th, 1848."

"Mr. Brush presented your proposal to compromise, my answer is that by sending me to-day \$225 all further trouble in this matter can be saved, and satisfaction of judgment be given without expense of execution, &c.

"(Endorsed) 'To C. B. Smith, Esq.'"

"Mr. Smith can save himself the trouble of writing to Mr. Cumming as Mr. Bradley is not with him, and as I have an irrevocable power of attorney from Bradley to settle the suit and receive all monies that may be coming due from it. I give you this notice that you may fully understand that any money you may pay on the judgment or verdict to, or any

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settlement you may make, in the case of *Bradley v. Keteltas*, with any person except me will not be considered any payment of said verdict, having had notice of my power of att'y, and I shall hold your client responsible for every dollar of said verdict not paid to me in person. June 9th, 1848.

"Yours, &c.,

"L. E. BULKELEY.

"(Endorsed) 'To C. B. Smith, Esq.'"

These affidavits and papers were produced, and read in evidence by the plaintiff; and the Chief Justice decided that they were evidence in favor of the defendants—the same as if the parties making the affidavits as witnesses in the cause had testified to the same facts.

The plaintiff was brought before the magistrate upon a warrant, but, after a hearing of the parties by their counsel, and the lapse of some weeks, the complaint was finally dismissed. The defendant, Smith, then laid the same affidavits and papers before the District Attorney, who sent them to the Grand Jury as, in his opinion, establishing, *prima facie*, the charge of perjury. The Grand Jury found a bill against the plaintiff, charging him with perjury in having sworn falsely on the trial in the Common Pleas that he had no interest in the event of the suit. He was tried on this indictment before Mr. Recorder Scott, who, when the testimony on the part of the prosecution was closed, directed his acquittal, upon the ground that it had not been proved that he had any interest in the event of the suit, which disqualified him as a witness.

The evidence upon the present trial as to the testimony actually given by the plaintiff on the trial in the Common Pleas, to some extent was contradictory. Three or four witnesses were examined in relation to it upon the part of the plaintiff, and ten or twelve on the part of the defendants. The substance of the testimony is stated in the opinion of the Court.

Bradley, the plaintiff in the suit in the Common Pleas, who was examined on the part of the plaintiff, proved that he was absent when that action was tried; but that, after his return, on the 13th June, 1848, he had executed to the plaintiff an assignment of all his title and interest in the verdict and judg-

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ment; and that this was the only assignment he ever executed.

When the testimony on the part of the defendants was closed, the counsel for the defendant moved for a dismissal of the complaint. The motion was denied, and the counsel excepted.

The counsel for the defendants made various special requests as to the charge to be given to the jury; but these, as their nature sufficiently appears from the points argued on the appeal, are here omitted.

The judge, in charging the jury, submitted to them on the whole evidence to find whether the defendant, Brush, was a party in instituting the prosecution against the plaintiff, instructing them that they were at liberty to find for one of the defendants and against the other, and to find separate damages against each.

The judge further instructed the jury, that if they should find that the plaintiff, in the action in the Court of Common Pleas, swore that he had no interest in the event of that suit, or if the defendants had reasonable grounds for believing, and did believe that he so swore, then, upon the facts proved in the case, and not disputed, and which were known to the defendants, the law determines that a want of probable cause for instituting a prosecution against the plaintiff is not shown, and the defendants are entitled to the verdict.

The judge further instructed the jury that proof of actual malice on the part of the defendants is not necessary, provided want of probable cause is established, for the jury have a right to infer malice from a want of probable cause; and, with this instruction, left the evidence in the case to the jury.

The court declined to charge according to the requests of the parties otherwise than as above stated, and the defendants excepted to such refusal, and the court, with these instructions, left the case to the jury.

The jury retired, and brought in a verdict for the plaintiff assessing the damages of \$2,500 as against Smith, and \$500 against Brush.

The following is the form of the judgment from which the appeal was taken.

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"This cause being at issue, and having been, by order of the Court of Appeals, sent down for a new trial, costs to abide the event, and a trial had, upon which the court directed the acquittal of Eugene Keteltas, one of the defendants, and thereupon a verdict was found for the plaintiff for the sum of twenty-five hundred dollars damages against the defendant, C. B. Smith, and for five hundred dollars damages against the defendant, James H. Brush.

"And whereas the said plaintiff elects to recover the said sum of \$2,500 damages so found by the jury against both defendants, and doth hereby consent that a remittitur as to the \$500 damages assessed by the jury against the defendant, James H. Brush, be entered in this action."

"Now, on a motion of Lucius E. Bulkeley, plaintiff in person, it is hereby ordered and adjudged that a remittitur be entered as to the said \$500 damages, assessed against the defendant, James H. Brush, and that the plaintiff, Lucius E. Bulkeley, recover of the defendants, C. Bainbridge Smith and James H. Brush, the said sum of twenty-five hundred dollars damages by the jury aforesaid, assessed, with interest on said verdict from the time the said verdict was rendered, being fourteen 58-100 dollars, together with an allowance of one hundred dollars as by order of the court, pursuant to the statute, besides the sum of five hundred and thirty-nine dollars and ninety-seven cents costs; in all, the sum of three thousand one hundred and fifty-four dollars and fifty-five cents, and that plaintiff have executions against the said defendants therefor.

"R. G. CAMPBELL, Clerk."

C. B. Smith made and argued the following points on his own behalf, and that of his co-defendant.

I. The plaintiff having entered judgment against both defendants for the larger sum, when the verdict of the jury was for that amount against one, only renders the judgment erroneous, and it should be reversed on that ground. (*Salmon v. Smith*, 1 Saund. R. 207, n. 2; *Hill v. Goodchild*, 5 Burr. 2790; *Mitchell v. Millbank*, 6 T. R. 199; *Brown v. Allen*, 4

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Esp. N. C. 158; *Wakely v. Hart*, 6 Bin. R. 316; *Bostwick v. Lewis*, 1 Day R. 34; *Crawford v. Morris*, 5 Grat. R. 90; Cro. El. 11 Co. 6a. 7a.; Carth. 19, Bull. N. P. 15; 1 Wil. 30; Cro. Car. 192.) 1. Whatever may have been the practice in former times where the jury have severed, to enter judgment against both for the greater damages, it has never been adopted in this State. (*Livingston v. Bishop*, 1 J. R. 289; *Bohun v. Taylor*, 6 Cow. R. 313; *Holly v. Mix*, 3 Wend. R. 350.) 2. Before the judgment was perfected, the plaintiff might have cured the verdict, by taking judgment *de melioribus damnis* against one, and entering a *nolle prosequi* as to the other. (Id.) The judgment having been entered against the defendants jointly, it is entire, and from which they appeal; if it be erroneous as to either, it must be reversed as to both. (*Sheldon v. Quinlen*, 5 Hill R. 441; *Harman v. Brotherson*, 1 Den. R. 537; *Van Bokkelen v. Ingersoll*, 5 Wend. R. 341; *Van Schoonhoven v. Comstock*, 7 Den. R. 655; Bac. Abr. Error, M. I.)

II. There was reasonable and probable cause for the prosecution. Probable cause is defined to be a reasonable ground of suspicion, supported by circumstances, sufficient to warrant a cautious man in the belief that the person is guilty of the offence charged, and probable cause in all cases is a question of law. (*Johnstone v. Sutton*, 1 T. R. 545; *Skinner v. Gunter*, 1 Saund. R. 228; *Baldwin v. Weed*, 17 Wend. R. 227; *Swaim v. Stafford*, 4 Wash. C. C. R. 79; *Davis v. Hardy*, 6 B. & C. R. 225.) 1. It seems conceded, that if the plaintiff did in fact testify in the N. Y. Common Pleas suit, "he was not interested in the event thereof," or that the defendants believed he so testified, probable cause is established. 2. There were ten witnesses beside the defendants, who testified to the plaintiff having so sworn, and the court erred in submitting the question of belief to the jury. It is not what a prosecutor believed, but whether the facts and circumstances were sufficient to afford a ground for belief, and that is for the court to determine. (*Turner v. Ambler*, 10 Q. R. 252; *Beale v. Robertson*, 7 Iredell R. 284; *Ewing v. Sandford*, 21 Ala. 163; *Foshay v. Ferguson*, 2 Den. R. 619.) 3. If the fact of ten witnesses testifying to the actual commission of an offence, be not enough to hold there was probable cause for making the complaint, then it follows,

that it requires as much proof, if not more, to suspect an offence has been committed, as it does to convict the prisoner of the crime itself.

III. It was incumbent upon the plaintiff to establish a want of probable cause. This must be substantially and satisfactorily proved, and cannot be implied. The grounds of the action are, on the plaintiff's side, innocence—on the defendants', malice; and how can it be said that the complaint was without probable cause, or how can he establish his innocence, when he can only escape from the crime itself, by asserting his own notices to be false? (*Johnstone v. Sutton*, 1 T. R. 544; *McCormick v. Sissons*, 7 Cow. R. 715; *Burlinghame v. Burlinghame*, 8 id. 141; *Murray v. Long*, 1 Wend. R. 142 (per Holt, C. J. Mod. 208); *Wilmarth v. Mountford*, 4 Wash. C. C. R. 79; *Eager v. Dyott*, 5 C. & P. R. 4.)

IV. The court erred in charging the jury upon the question of malice. The jury were instructed that proof of actual malice was not necessary, provided want of probable cause was established; that they had the right to infer malice from the want of probable cause. 1. True, the question of malice is for the jury, but to sustain the averment, the charge must be shown to have been wilfully false. (*Cohen v. Morgan*, 6 D. & R. 8.) 2. But the court did not, as requested, instruct the jury what constituted malice. It is not spite or enmity. (Id. 2 Greenleaf on Ev., p. 367; 3 Stepen, 2278; *Mitchell v. Jenkins*, 5 Barn. & Ad. 588; *Ray v. Law*, 1 Pet. C. C. R. 207.) From the want of probable cause, malice may be implied (1 T. R. 545); but not necessarily so (*Wiggin v. Coffin*, 3 Story R. 1; *Bell v. Pearoy*, 5 Iredell R. 83); and in leaving to the jury that question, under the instructions of the judge, it was substantially submitting to them the question of probable cause.

James T. Brady argued the following points on the part of the plaintiff.

I. There was not any reasonable or probable cause for the institution of any complaint against the plaintiff for perjury. If it were believed at any time, of which there is no evidence, after the complaint was dismissed by the police magistrate for

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want of proof, such belief must have been ended. 1. By persisting in sending to the grand jury, after the dismissal of the complaint, and prosecuting it in the sessions, the defendants made themselves responsible under any state of facts, unless they had some new evidence to support their second accusation. In this case they had no new facts. (*Farris v. Starke*, 3 B. Monroe 6; *Hall v. Hawkins*, 5 Humpf. 359; *Stone v. Stevens*, 12 Conn. 231; *Stone v. Crocker*, 24 Pick. 87; *Wells v. Noyes*, 12 id. 324; *Cabeness v. Martin*, 3 Dev. 454.) 2. Even though it were assumed that the defendants understood the plaintiff to have testified that he had no interest in the cause, they had no evidence that the statement was untrue, nor any facts upon which they could maintain it. 3. From their own papers and proofs, the only evidence they pretend to have of the plaintiff (if he had sworn that he was not interested) was not true, consisted of his unsworn declarations, and not of any facts showing such alleged falsehood. They were all lawyers, and knew that such declarations afforded no ground for a prosecution for perjury. (1 Greenl. Ev. § 258.) 4. The judge charged the jury, that even if defendants believed plaintiff swore "that he had no interest," they must find a verdict for them. In this, we say, the judge gave them more than the law warrants, for mere belief is not sufficient.

II. The plaintiff had the right to remit, as to the lesser damages, and enter judgment against both defendants for the greater damages. (*Johns v. Dodsworth*, Cro. Car. 192; *Halsey v. Woodruff*, 9 Pick. R. 555; 7 Vin. Abr., p. 303.) 1. The plaintiff may, in such a case, by leave of the court, enter *nol. pros.* as to one defendant, and judgment for damages against the other. 2. The case in 3 Wend., 350, is one of the latter class. There it was doubtful whether the evidence against Clute, one of the defendants, was such as that he ought not to have been discharged; and the plaintiff obtained leave of the court to enter *nol. pros.* as to him, and took judgment against Mix, the other defendant. 3. But neither in this case, nor in any other, is there anything incompatible with the right of the plaintiff, as laid down in *Halsey v. Woodruff*.

BY THE COURT. DUEB, J.—Whether the judgment, which, in

this case, has been rendered against both the defendants for the heavy damages which were found by the jury only against one of them, is erroneous on its face, we shall not at this time attempt to determine. We own, that hitherto we have not been able to discern the equity or good sense of the doctrine, that the plaintiff in an action for a tort, when the jury have improperly severed the damages, may enter his judgment against all the defendants for the largest damages that are given; and, as at present advised, if the conflict of the authorities is such as to allow a liberty of choice, we should certainly refuse to follow it. (*Vide* 1 Duer S. C. R., pp. 643-704.) It is possible that the authorities in support of the doctrine may be as conclusive as they have been represented; but whether they are so or not we omit to inquire, since, admitting the fact, there are other grounds upon which we are satisfied that not only the judgment, but the verdict upon which it was founded, must be set aside. In other words, that a new trial must be ordered.

In order to maintain a suit for a malicious prosecution, the plaintiff is bound to prove the entire want of a probable cause for the accusation, and the actual malice of the defendant in preferring it. Malice is a question of fact, which, when the cause turns upon it, must be decided by the jury, but probable cause is in all cases a question of law, which the court alone is competent to determine, and in relation to which the judge who tries the cause is bound to express a positive opinion. It is true, it is said, by many of the text writers, that probable cause is "a mixed question of law and fact;" and, misled by this statement, it not unfrequently happens that judges content themselves with defining a probable cause, leaving the jury to decide whether the facts of the case correspond with the definition, which is, in effect, leaving the whole matter to their determination. It is evident, however, upon reflection, that the deceptive phrase, "a mixed question of law and fact," is either wholly unmeaning, or is intelligible and true only in a sense which renders it just as applicable to every question of law that a judge in the progress of a trial can be required to determine. Every rule of law depends for its application upon a given state of facts, and when the facts upon which it depends are controverted and doubtful, they must of necessity be ascer-

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tained by the verdict of the jury ; but whether the facts are admitted or disputed, it is equally the duty of the judge to state explicitly to the jury the rule of law arising upon them, by which their verdict ought to be controlled—the only difference being, that, in the first case, the direction to the jury is positive, in the second, hypothetical. Thus, in an action for a malicious prosecution, if the judge is of opinion that the facts admitted or clearly established are not sufficient to prove a want of probable cause, he must either nonsuit the plaintiff, or instruct the jury to find their verdict for the defendant ; but if the facts upon which, in his judgment, the question depends are rendered doubtful by the evidence, he must instruct the jury that if the facts shall be found by them in a certain manner, they do or do not amount, as the case may be, to a want of probable cause, and consequently will, or will not, entitle the plaintiff to the verdict which he seeks. If, instead of such a direction, he leaves it to the jury to determine not only whether the facts alleged by the plaintiff are true, but whether, if true, they prove a want of probable cause, he abjures his own functions, and commits a fatal error.

We deem it unnecessary to refer to any cases in the English reports, or in our own, in support of these positions, since, could we have been justified in considering the law as previously doubtful, we are bound to regard it as now settled by the recent decision of the court of appeals reversing the judgment of this court, and ordering a new trial, in the very case that is now before us. The ground of this reversal was, that the judge told the jury that it was their province to determine whether the facts and circumstances in evidence did or did not establish the want of probable cause, thus leaving the whole matter to their determination, instead of expressing his own opinion as to the conclusion of law to be drawn from the facts, as alleged by the plaintiff, should the jury believe them to be proved.

Bound as we are by this decision, we are constrained to say that the charge of the presiding judge upon the last trial, was just as erroneous as that which led to the reversal of our former judgment, as from the terms in which it was expressed, it necessarily involved the submission to the jury of the question of probable cause, and was not limited to the facts upon which

the question depended. He instructed the jury, that they were to consider and determine whether the facts and circumstances known to the defendants were reasonable grounds for their believing that the charge which they made against the plaintiff was true, and we are unable to make a distinction between the existence or non-existence of reasonable grounds of belief, and the existence or want of a probable cause. There is a difference in the form of expression, but none in the meaning, since the existence of reasonable grounds for believing a charge to be true, is, in reality, nothing more than a legal definition of a probable cause for making it. In deciding that there were no reasonable grounds of belief, a jury, of necessity, decides that there was a want of probable cause. The charge of the judge, therefore, amounted to no more than the definition which the law gives of probable cause, and permitted the jury, in the exercise of their own judgment, to apply the definition to the facts of the case—that is, permitted them to determine whether the facts which they might consider to be proved, did or did not amount to a want of probable cause. It was because this question upon the first trial was decided by the jury, and not by the judge, that our former judgment was reversed.

The judge, in the charge before us, also submitted to the jury, as a material question, whether the defendants themselves believed the charge against the plaintiff to be true when they preferred it; and it is not impossible, nor improbable, that it was upon the ground of the disbelief of the defendants that the jury founded their verdict. We apprehend, however, that when in an action for a malicious prosecution the existence of facts constituting a probable cause is admitted or established, the presumption of law is, that the defendant entertained and acted upon the belief which the circumstances within his knowledge justified him in holding; nor have we found a single case in which, under these circumstances, the question of the actual belief of the defendant has been submitted to the decision of the jury. We do not say that cases may not arise in which this submission of the question might be eminently proper, but we are clearly of opinion that this can only happen when the presumption of law, to which we have adverted, is met and repelled by affirmative proof on the part of the

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plaintiff. (Vide *Carpenter v. Sheldon*, 5 Sand. 97, Nos. 5 and 6.)

In the present case, if the defendants did not believe the charge which they made against the plaintiff, they were guilty, in the affidavits upon which the charge was founded, of wilful and deliberate perjury; and, looking at all the evidence in the case, it seems to us it would be monstrous to say that the jury could be justified in drawing such a conclusion, and if not warranted to draw the conclusion, the question involving it ought not to have been submitted to their determination.

Eight or ten of the witnesses examined on the trial swore substantially to the same facts as the defendants.

They were, all of them, disinterested and unimpeached, and it has not been pretended that they did not sincerely believe that the facts to which they swore had actually occurred. They may, all of them, have been mistaken; but it appears to us, that a jury could no more be justified in imputing to the defendant the guilt of intentional falsehood, than to the witnesses by whom they were sustained. If, therefore, the verdict of the jury, as was asserted upon the argument, proceeded upon this supposition, their verdict, even could we admit that the question was properly submitted to them, we are bound to say, is unsustained by the evidence; and upon that ground alone, were there no other, ought to be set aside.

The observations that have now been made are sufficient to justify us in granting a new trial, but they do not cover all the questions that have been raised, and which, in order that this protracted litigation may be closed, it seems necessary to determine. We have, therefore, felt it our duty to examine, with care, all the evidence that was given upon the trial, and we now state, as the result of the examination, our full conviction, not only that the plaintiff failed to prove, as he was bound to prove, the want of a probable cause; but that, confining ourselves to undisputed facts, the existence of a probable cause was affirmatively shown. He might, therefore, have been rightfully nonsuited, or the jury have been positively instructed to find a verdict in favor of the defendants.

The charge against the plaintiff was, that when examined as a witness in the suit in the common pleas, he had falsely sworn

that he had no interest in the event of the suit; and the material inquiry is, whether the defendants were justified in believing that such was the testimony that he actually gave; that if he gave this testimony, his subsequent acts and declarations justified them in believing it to be false, was in effect decided by the chief justice upon the trial; and, judging from the opinion of Mr. Justice Gridley, with which we have been furnished, was plainly meant to be decided by the court of appeals.

Now the truth of the proposition seems to us too manifest to require an argument, that in order to justify the defendants it was not necessary for them to prove that the plaintiff had sworn, in terms, that he had no interest in the event of the suit in which he was examined, or that the question whether he was so interested or not, was directly put to him. If he was cross-examined for the purpose of showing that he had an interest beyond that which belonged to him as the attorney of the plaintiff, and which rendered him incompetent as a witness; and if, when thus examined, he swore to facts that, if true, conclusively proved that he had no interest that could affect his testimony, the existence of a probable cause for the charge subsequently made against him was, in our judgment, conclusively established. It was conclusively established, if he swore in substance, although not in words, that he had no interest that could disqualify him as a witness.

Now, when we read, with any attention, the testimony of his own witnesses, who were present at his examination in the common pleas, it is evident that the object of his cross-examination, and the purport of the testimony which he then gave, were exactly such as have been stated. By the confession of those witnesses, he did swear in substance, although not in words, that he had no interest in the event of the suit. Those witnesses, Messrs. Sandford, McClelland, and Russell, it is true, unite in saying that the plaintiff was not asked at all whether he was interested in the event of the suit, and consequently could not have replied as the defendants had sworn, that he had no such interest; but they also unite in saying that he was asked whether there was any agreement between him and his client, and that in his reply he positively denied that any such

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agreement existed. We think it cannot be doubted that the object of this question was to ascertain whether he had any interest beyond that which belonged to him as the attorney (and which the court had already decided was not sufficient to disqualify him), that by proving his incompetency, would compel the court to reject his testimony, since such an interest, if it existed, could only be founded on or derived from a positive agreement between him and the plaintiff in the suit; and it is undeniable that the plaintiff affirmed, by a necessary implication, that he had no interest in the event of the suit, by denying the existence of any agreement from which the interest could have been derived.

Nor is this all: that such was understood at the time to be the object of the question, and such the effect of the reply, is distinctly stated by the witness, Russell, who says that the question was asked, "to find out whether the verdict was to go to the plaintiff or the lawyer," and that he understood from the reply that it was to go to the plaintiff, Bradley, alone. The witness, therefore, understood the plaintiff as swearing that he would have no interest in the verdict he was endeavoring to obtain; and this, under the circumstances, was precisely equivalent to saying that he had then no interest in the event of the suit.

Let us now suppose that the defendants, in the affidavits which they laid before the police magistrate, had stated the testimony of the plaintiff exactly as it has been stated by the witnesses we have named, and, in order to prove the testimony to be false, had then produced the letter which he addressed to the defendant, Smith, on the day immediately following the verdict, and in which, by force of a power of attorney from his client—a document which, if it existed at all, must have been in his possession when he gave his testimony—he claimed an exclusive title to demand payment of the judgment, and in truth, by stating the power to be irrevocable, claimed to be its exclusive owner, could it then have entered into the mind of any one to imagine that the present action could be maintained? Is it not plain that the plaintiff, under these circumstances, so far from having a right to say that there was no probable cause for the charge of perjury, could only have

escaped from the imputation, by showing that the testimony which he gave was true, and the assertions in his letter wholly false. That the defendants believed these assertions in preference to his testimony, certainly afforded to him no just cause of complaint, since the letter was evidently written with the intent that the defendants, Smith and Keteltas, should believe its contents to be true, and in the expectation that this belief would influence their conduct. And we assent entirely to the position of Mr. Justice Washington, that when it appears, in an action for a malicious prosecution, that the plaintiff, by his own folly or fraud, exposed himself to a well grounded suspicion of guilt, this alone is sufficient evidence of probable cause. (*Wilmarth v. Mountford*, 4 Wash. C. C. R., p. 82.)

The case, as it now stands, in our judgment, rests substantially upon the same grounds, and is governed exactly by the same considerations, as if the affidavits of the defendants had been made in the form that has been stated; for the supposition that the defendants could only meet the allegation of a want of probable cause, by showing that the plaintiff, when examined in the Common Pleas, had sworn in express words, that he had no interest in the event of the suit, we cannot at all hesitate to reject. We have already said that the existence of a probable cause was established, by showing that the intent and the result of his testimony was to convince the court and jury that he had no interest in the event of the suit that could lead to the rejection of his evidence; and this, we have seen, his own witnesses have proved.

Finally, had the true and sole issue been, whether the testimony of the plaintiff was given in the very words that are found in the affidavits of the defendants, we should still have felt it our duty to set aside the verdict that was rendered.

There is a great preponderance of unimpeached and unsuspected testimony, that the language of the plaintiff was exactly such as the defendants represented, and such are the doubts necessarily arising upon the whole evidence, that even had the question been such, as we have supposed, the presiding judge, in our opinion, would have been fully justified in telling the jury that the plaintiff had failed to establish, by the necessary proof, the want of a probable cause, and that the

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defendants were consequently entitled to the verdict. Since the great leading case of *Johnstone v. Sutton* (Term. R. 544), the law is settled, that the essential ground, in the language of Lord Mansfield, of the action for a malicious prosecution, is the want of probable cause, and that, in all cases, this must be substantially and expressly proved. It follows that when the evidence is doubtful, it is in favor of the defendant that the doubt must be determined.

It is not to be understood that in granting a new trial, we mean to express any approbation of the conduct of the defendants, and more especially of the defendant, Smith. The jury may well have thought that in persisting, as he did, in the prosecution of the plaintiff, he was actuated not at all by a sense of public duty, but solely by motives of private revenge. Had the sole question been, whether the imputation of express malice was justified by the evidence, we could not have disturbed the verdict that was given. It is true, that from the entire want of probable cause, malice may be inferred, but the converse of the proposition is by no means true, that where express malice is proved, the want of probable cause may be implied. Still less is it true, that damages may be given to punish the malice, even when the existence of probable cause is fully established. It is into this error, however, that the jury appears to have fallen.

Verdict set aside, and a new trial ordered, with costs to abide the event.

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The certificate of a notary at New Orleans relative to the demand of payment and notice of dishonor of a promissory note payable in that city, although legal proof of the facts by a statute of Louisiana, cannot be read in evidence in the courts of this state.

Although in many cases a foreign law must be followed, as a rule of final decision, there are none in which it can be permitted to set aside our own rules of evidence.

It is only in relation to foreign bills of exchange that the protest of a foreign

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notary can be read in evidence, and a promissory note is not converted into a bill of exchange by being made payable in a foreign place.

The provisions of our own statute upon this subject apply only to protests made within this state by our own notaries.

Verdict set aside. New trial ordered.

(Before DICKS, PAINE, and EMMET, J.J.)

May 17; June 25, 1853.

THIS was an action by the plaintiff as endorsee against the defendants as first and second endorsers of two promissory notes made by McCounell & Brothers, and payable 12 months after date to the order of Wanzer, Minor & Co., at the office of Rich. McConnell, Esq., in New Orleans.

The defendants, in their answer, denied that the notes had been duly presented for payment or duly protested, and also set up new matter as a defence which it is unnecessary to notice, as it was abandoned on the trial.

This cause came on to be tried, in its order, on the twenty-seventh day of January, one thousand eight hundred and fifty-three, before his Honor Justice Campbell, and a jury duly empaneled; and the plaintiff, to maintain the issue on his part, read in evidence from the Statutes of Louisiana, vol. 1st, page 93, a Statute of Louisiana, entitled an Act concerning Protests of Bills of Exchange and Promissory Notes, and Notices to be given to Drawers and Endorsers, in the following words:

“Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened: That the notaries and parish judges shall keep a separate book, in which they shall transcribe and record, by order of date, all the protests by them made, with mention of the notices which they shall have given of the same to the drawers or endorsers thereof, together with the names of the said drawers or endorsers, the date of the said notices, and the manner in which they were served or forwarded to the said drawers or endorsers; which declaration, duly recorded under the signature of the said notary public or parish judge, and two witnesses, shall be considered and received, in all courts of this State, as a legal proof of the said notices. All notaries, or persons acting as such, are authorized, in their protests of bills of exchange, promissory notes, or orders for the payment of money, to make

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mention of the demand made upon the drawer, acceptor, or person on whom such order or bill of exchange is drawn or given, and of the manner and circumstances of such demand, and by certificate added to such protest, to state the manner in which any notices of protest to drawers, endorsers, or other persons interested, were served or forwarded; and whenever they shall have so done, a certified copy of such protest and certificate shall be evidence of all matters therein stated.

"Whenever such drawer, acceptor, endorser or others, shall not reside in the town or city where protest shall be made, then, and in such case, it shall be the duty of such notaries, or others acting as such, to put into the nearest post-office where a protest is made, a notice of such protest to such drawer, acceptor, endorser or others, addressed to them at their domicil, or usual place of residence." Plaintiff's counsel further read in evidence from volume 1st, page 61, of "Reports of Cases argued and determined in the Supreme Court of Louisiana," by Merritt M. Robinson.

The plaintiff's counsel then read in evidence the notes, and two certificates of protests of the said notes.

Which evidence was objected to, as inadmissible, on the ground that they purported to be certificates of a foreign notary, and were without authentication, and insufficient as proof of either presentment, protest, or notice of protest of said notes.

The Court overruled the objections and admitted the evidence as follows :—

"\$577 ⁹¹/₁₀₀.

"NEW YORK, April 5, 1851.

"Twelve months after date, we promise to pay to the order of Wanzer, Minor & Co., five hundred and seventy-seven ⁹¹/₁₀₀ dollars, value received, payable at the office of Richd. McConnell, New Orleans, La.

"McCONNELL & BRO.,

"*Memphis, Tenn.*

ENDORSED :

"Pay Brown, Johnston & Co., or order.

"WANZER, MINOR & CO., NEW YORK.

"CROMWELL, HAIGHT & CO., NEW YORK.

"BROWN, JOHNSTON & CO."

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"United States of America, State of Louisiana :

"By this public instrument of protest be it known, that on this eighth day of April, in the year one thousand eight hundred and fifty-two, at the request of Messrs. Brown, Johnston & Co., holders of the original note whereof a true copy is on the reverse hereof written, I, John Claiborne, a notary public in and for the city and parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, after inquiry of several persons in this city, for the office of Richard McConnell, learned that Thomas H. Jackson, of this city, was his agent here, and upon repairing to his store to demand payment of said note, I was by him informed that he knew that Mr. McConnell was now in the State of Mississippi, and had no office in this city, and that although he had occasionally remitted to said Jackson funds for the payment of debts, he had not remitted any for the payment of said note.

"Whereupon I, the said Notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest as well against the drawer or maker of the said note as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges and interest, suffered or to be suffered for want of payment of the said note.

"Thus done and protested in the presence of Edmond Florian Malus and James Claiborne, witnesses. Original signed, E. Florian Malus, James Claiborne, John Claiborne, Not. Pub.

"In testimony whereof I grant these presents under my signature and the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

[L. S.]

"JOHN CLAIBORNE,
"Notary Public."

"NEW YORK, April 5, 1851.

"\$577 $\frac{11}{100}$

"Twelve months after date we promise to pay to the order of Wanzer, Minor & Co., five hundred and seventy-seven $\frac{11}{100}$ dollars, value received. Payable at the office of Richard McConnell, New Orleans, La.

"MCCONNELL & BRO.

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ENDORSED:

"Pay Brown, Johnston & Co., or order.

"WANZER, MINOR & Co., NEW YORK.

"CROMWELL, HAIGHT & Co., NEW YORK.

"BROWN, JOHNSTON & Co."

"I, the undersigned Notary, do hereby certify that the parties to the note, whereof a true copy is embodied in the accompanying act of protest, have been duly notified of the protest thereof by letters to them, by me written and addressed, dated on the day of said protest, and served on them respectively this day, in the manner following, viz :

"A notice to McConnell & Bro. was directed to them at Memphis, Tennessee, and the notices to Wanzer, Minor & Co., and to Cromwell, Haight & Co., were directed to them respectively at New York, and on the day of the above protest I did deposit the same in the Post-office in this city.

"In faith whereof I hereunto sign my name, together with Edmond Florian Malus and John Claiborne, witnesses at New Orleans, this eighth day of April, eighteen hundred and fifty-two. Original signed James Claiborne, E. Florian Malus, John Claiborne, Notary Public.

"State of Louisiana, City of New Orleans :

"I, John Claiborne, a Notary Public duly commissioned and sworn in and for the parish of New Orleans, State of Louisiana, do certify the foregoing to be a true copy of the original certificate of notice extant in my current notarial register.

"Witness my hand and official seal at New Orleans, this eighteenth day of August, A. D. 1852.

[L. S.]

"JOHN CLAIBORNE,
"Notary Public."

The protest and certificate relative to the second note were also read in evidence, and were substantially of the same import.

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The judge directed the jury to find a verdict for the plaintiff for \$832.22, the amount due upon the notes, subject to the opinion of the court upon a case to be heard, in the first instance, at the General Term.

A. C. Bradley, for the plaintiff, now moved for judgment upon the verdict, and insisted that the evidence objected to was properly received. 1. The certificates were in strict conformity to the laws of Louisiana, where the notes were payable. 2. Courts always and everywhere take judicial notice of the appointment and signature of Notaries Public. (*Shanklin v. Cooper*, 8 Blackford 41; *Bryden v. Taylor*, 2 H. & J. 396; *Philip v. Flint*, 8 Mill Lou. R. 149, &c.; *Caune v. Sagory*, 4 Martin Lou. R. 81; *Haliday v. McDougall*, 20 Wend. 81; 3 Cow. & Hill, 1852.) 3. It was part of the duties of notaries public in Louisiana, to demand payment and to give notice of non-payment as well of promissory notes, as of bills of exchange.

Wm. D. Booth, for the defendants, insisted that the verdict ought to be set aside, and argued as follows.

I. The certificates of protest were improperly admitted in evidence. They purported to be the certificates of a notary of Louisiana, and, 1. If regarded as the certificates of a foreign notary, should have been under a common law seal, to make them evidence of themselves. 2. If regarded as protests of inland bills; they should have been authenticated, or some proof given that the person making them was a notary.

II. If properly admitted, the certificates of protest are insufficient evidence of either the presentment, protest, or notice of protest, of the notes. The answer of the defendants denies any knowledge of either, and is under oath. 1. A notarial certificate is not evidence out of the State (*Dutchess County Bank v. Ibbotson*, 5 Denio, 110). 2. The act making notarial certificates proof of notice, applies to none other than notaries of this State (*Bank of Rochester v. Gray*, 2 Hill, 227). 3. It might be otherwise after the death of the notary; but not while the notary is living (5 Johns. 375; 20 Johns. 168; 5 Har. & Johns. 489). 4. A protest of an inland bill or note, is no evi-

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dence of demand or notice, by itself; it must be proved, as if no protest had been made (*Cummings v. Fisher*, Anth. N. P. 1; *Union Bank v. Hyde*, 6 Wheat. 572; *Nichols v. Webb*, 8 Wheat. 326, 7 Barr. 433).

III. The notes on which this action is brought, are "inland bills," and evidence of their alleged presentment and protest, and notice to endorsers, should have been given as such. 1. The law merchant that permits the protest of a notary made abroad, and under seal, to prove itself, is not applicable in this case (*Chitty on Bills*, 643; 2 Barn. & Ald. 696; 4 Camp. 129; 5 Johns. 175).

IV. The certificates are themselves defective, in that they fail to show a due presentment of the notes for payment, or that the notary presented them on making demand for payment (*Musson v. Lake*, 4 How. U. S. R. 262).

BY THE COURT. EMMET, J.—The statute of Louisiana, by its terms, makes the certificate of the notary legal proof of the facts which it embraces, only in the courts of that State, and were its provisions not thus limited, so far from being under any obligation to obey, we should be bound to disregard them. There are many cases in which a foreign law must be followed as a rule of decision upon the rights of the parties, but none in which it can be permitted to control and supersede our own rules of evidence.

Setting aside the statute, then, we are clearly of opinion, that the protests and certificates of the notary at New Orleans were not evidence, either at common law or under our own statute.

The law is settled, that it is only in relation to foreign bills of exchange, that the protest of a foreign notary can be admitted in evidence, and the notes now in prosecution are certainly not bills of exchange. It is true that promissory notes payable in another state or country, may, for remittance, answer the purpose of bills of exchange; but this circumstance is no more sufficient to convert them into bills of exchange than were they bonds under seal containing the same provision as to the place of payment.

As to our own statute it has no application. As we under-

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stand its provisions, it is only to protests made within this State, and by our own notaries, that they can be applied.

We shall give no opinion upon the question, whether if the protests and certificates could be properly read in evidence, the facts set forth would be sufficient to charge the defendants as endorsers. The notary must now be examined as a witness, and it is upon his testimony, when so examined, that the case must ultimately turn.

The verdict is set aside, and there must be a new trial, with costs to abide the event.

RENARD and others v. SAMPSON and another.

J. O., an agent of the defendants, on the 2d of April, 1847, addressed a letter to the plaintiffs in which he stated that "he had chartered on their account the A 1 ship Sarah for a voyage from Baltimore to Havre." The letter set forth in detail the terms of the contract and concluded with these words: "The ship to proceed from the port where she now is to Baltimore without delay." It was known to the parties that she was then in the port of Boston. On the 5th of April the plaintiff and defendants executed a charter-party in due form, which stated that the ship was then lying in the port of Boston, but contained no stipulation as to the time within which she was to proceed from that port to Baltimore. The action was upon the agreement in the letter, and the breaches alleged were that the ship was not A 1, and did not proceed without delay from Boston to Baltimore.

Held, that the charter-party, although not by express words, yet by intendment of law, covered the voyage from Boston to Baltimore, as well as from Baltimore to Havre, and bound the defendants to commence that voyage within a reasonable time.

Held therefore, that the agreement in the letter was merged in the charter-party, and that parole evidence to vary the legal construction of the latter was inadmissible.

Upon these grounds, judgment dismissing complaint affirmed with costs.

(Before DUEK, PAINE, and EMMET, J.J.)

May 24, 25; June 2

APPEAL by plaintiffs from a judgment at Special Term, dismissing the complaint.

The action was brought to recover damages for the breach of

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a special agreement, relative to the chartering of the ship *Sarah* on a voyage from Baltimore to Havre.

The complaint averred that the defendants being in the possession, or having the control of the ship, or vessel, called the *Sarah*, then lying in the port of Boston, employed one John Ogden, of the city of New York, as their agent or broker, to effect a charter of the said vessel from some port of the U.S. upon some foreign or other voyage. That Ogden, as such agent, applied to the firm of Renard & Co. of New York (the plaintiffs in the suit) to charter the said vessel, and on the 2d day of April, 1849, concluded an agreement with them, the terms of which are contained in a letter which on that day he wrote and delivered to them. The letter is as follows:

"New York, April 2d, 1847.

"MESSRS. RENARD & Co.,

"Gent.—I have chartered for your account the A 1 ship *Sarah*, for a voyage from Baltimore to Havre—cargo to consist of one-half flour and one-half wheat, with the privilege of sacks; wheat at sixty pounds to the bushel, and rye fifty-six pounds—freight at one dollar and seventy-five cents per bbl., and grain at forty-seven cents per bushel, with five per cent. primage—the vessel to go consigned to your friends in Havre, with the usual commissions—twenty lay days to be allowed in Baltimore for loading; should any alteration be required in Baltimore, in altering the quantity of grain or flour, to be arranged between the captain and your friends—freight to be paid at the rate of five francs and twenty-five centimes to the dollar—the ship to proceed from the port where she now is, to Baltimore without delay.

"Your ob't servt.,

"JOHN OGDEN."

The complaint set forth as breaches of this agreement that the vessel at the time of the agreement was not of the class called A, No. 1, but that great repairs and changes were necessary to make her such, and that the said vessel did not proceed from Boston to Baltimore until or about the 21st day of the same month of April, and therefore did not so proceed without delay

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within the meaning of the contract; and averred that by reason of these breaches the plaintiffs had sustained great loss and damages amounting to \$20,000, for which sum judgment was demanded.

The defendants, in their answer, admitted that on the 2d of April, 1847, their agent, Ogden, communicated with them in Boston by telegraph respecting the terms of chartering the said vessel, and that they, the defendants, on the same day communicated back with the said Ogden expressing their assent to, and directing him to close on, the terms proposed; but they denied that the agreement was closed on that day, or that there was any verbal and binding agreement whatever until the 5th day of April, 1847, when a contract of affreightment or charter-party was made and executed by Renard & Co. and the defendants bearing date the 2d of April, 1847, in the words and figures following:

"This charter-party, made and concluded upon in the City of New York, the 2d day of April, in the year of our Lord one thousand eight hundred and forty-seven, between Messrs. Sampson and Tappan, of Boston, agents for the owners of the ship Sarah, of the burden of — tons or thereabouts, register measurement, now lying in the harbor of Boston, of the first, and Messrs. Renard & Co., of New York, of the second part: Witnesseth, that the said party of the first part agrees on the freighting and chartering of the whole of the said vessel (with the exception of the deck-cabin, and necessary room for the crew and storage of the provisions, sails and cables), or sufficient room for the cargo hereinafter mentioned, unto said party of second part, for a voyage from Baltimore to Havre, in France, on the terms following:

"The said vessel shall be tight, staunch, strong, and every way fitted for such a voyage, and receive on board during the aforesaid voyage the merchandise hereinafter mentioned; and no goods or merchandise shall be laden on board otherwise than from the said party of the second part or agent. The said party of the second part doth engage to provide and furnish to the said vessel, at Baltimore, a full cargo of flour and grain, one-half to be flour, and the balance to be wheat and rye in

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sacks, not to exceed three thousand bushels of rye, and to pay to said party of the first part or agent, for the use of said vessel during the voyage aforesaid, one dollar and seventy-five cents per barrel for flour, and forty-seven cents per bushel of 60 lbs. of wheat and rye, with five per cent. primage, payable on the discharge of the cargo, at the rate of five and a quarter francs to the dollar. It is agreed that the lay-days, for loading and discharging, shall be as follows: Commencing from the time the captain reports himself ready to receive or discharge cargo, twenty days at Baltimore, for loading; to discharge with dispatch; and that for each and every day's detention by default of said party of second part or agent, eighty-five silver dollars per day, day by day, shall be paid by said party of second part or agent, to said party of the first part or agent; the cargo or cargoes to be received and delivered within reach of the vessel's tackles, at the ports of loading and discharging.

"The vessel to be addressed to the charterers' friends at Havre, subject to the usual commission.

"To the true and faithful performance of all and every of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, each to the others, in the penal sum of eleven thousand dollars.

"In witness, &c.

(Signed)

"SAMPSON & TAPPAN,
"RENARD & Co.,"

and the defendants insisted that by the execution of this charter-party all previous agreements, negotiations and proposals in relation to the chartering of the vessel, became of no effect, and that from that time the charter-party became and was the only existing and valid agreement between the parties in relation thereto.

The plaintiffs in their reply admitted the execution of the charter-party, but denied that by its execution all previous agreements, negotiations, and proposals in relation to the chartering of the vessel, became void, and the charter-party the only valid and existing agreement between the parties; and on the contrary the defendants averred that the charter-party embraced only so much of the previous agreement as concerned the vessel after

she should arrive at Baltimore, leaving the stipulation—in the letter of Ogden—that the vessel should proceed to Baltimore without delay, in full force.

The pleadings, which are voluminous, contain various other allegations and denials, but none that have any relation to the real merits, or any bearing upon the questions argued and decided.

The cause came on for trial before the Chief Justice and a jury, in May, 1852, and after the counsel for the plaintiffs had opened the case to the jury, the counsel for the defendants moved upon the pleadings that the complaint should be dismissed. The Chief Justice granted the motion, and the counsel for the plaintiffs excepted to his decision.

The case made upon this exception was first heard at Special Term, when a new trial was denied and judgment entered for the defendants. It was now heard upon an appeal from this judgment.

F. B. Cutting, for plaintiffs, argued for a reversal of the judgment, and insisted that

I. The agreement that the ship *Sarah* should proceed from Boston, where she then was, to Baltimore without delay, was upon sufficient consideration, and was in other respects a binding and valid obligation.

II. The inducement for agreeing to charter the ship for a voyage to commence at Baltimore, was the representation that, although she was then in Boston, she was "all ready for sea," and would sail and proceed thence without delay; and consequently the plaintiffs had the right to expect, and did expect, that she would be in Baltimore within the time of an ordinary passage, and but for the representation and the agreement that she was then in a condition to proceed, and would without delay proceed from Boston, the charter from Baltimore would not have been entered into. The plaintiffs acted upon this arrangement, and purchased and stored cargo in anticipation of the early arrival of the vessel in Baltimore. In fact, the ship was not "all ready for sea," and, on the contrary, she required great repairs, so that she was detained in Boston for upwards of

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18 days, and by reason of this delay the plaintiffs suffered thereby great loss in storage and expenses on parts of the cargo bought, and in the price they were obliged to pay for the residue, and in the loss of a market.

III. The charter-party, dated in April, 1847, (not under seal) embraced and covered the voyage from Baltimore to Havre only, and did not merge or extinguish the pre-existing contract for the immediate dispatch of the vessel from Boston to Baltimore. The contract that the ship was all ready for sea, and should proceed from Boston to Baltimore without delay, was not discharged or released or otherwise rendered ineffectual by the contract for the voyage from Baltimore to Havre. That was a distinct, separate and independent contract for a service to commence when the agreement to proceed without delay from Boston to Baltimore had ended. The agreement to sail from Boston without delay was for something to be done anterior to the service contracted for in the charter-party, and did not contradict or vary the terms of the charter-party.—(1 Greenl. Ev. sec. 275; *White et al. v. Parkin*, 12 East, 578.) The contract that the vessel was ready for sea, and would sail from Boston without delay, was in writing, and of as high an order of evidence as the charter-party. The written contract to proceed from Boston without delay did not contradict, vary or add to any thing contained in the agreement for the voyage, after the vessel had arrived at Baltimore, from thence to Havre. (1 Greenl. sec. 282.) The first agreement did not relate to the same subject matter. (1 Greenl. Evid. secs. 283, 285; *Ibid.*, sec. 284, &c.; *Lewis v. Gray*, 1 Mass. 297; *Lapham v. Whipple*, 8 Metcalf, 59; 3 Cow. & Hill Notes 1478; *Ibid.* 1473; *Jeffrey v. Walton*, 1 Stark, 267.)

H. E. Davies, for the defendants, resisted the motion upon the following grounds.

I. The stipulations contained in the letter of 2d April, 1847, are merged in the charter-party, and no action can be maintained thereon. 1. Such an intention is manifest from a careful examination of the letter and the charter-party; for, though the charter-party substantially follows the letter. yet there are eight

or ten important variations, in which new provisions are inserted, and old ones rejected. These variations show that the parties very deliberately considered the subject. 2. The provision of the letter, that the "Sarah" should proceed to Baltimore, without delay, is simply one of these variations, and was, undoubtedly, not inserted in the charter-party by reason of the known interest of the respondents to forward the "Sarah" as soon as possible. 3. The facts that the charter-party (being made on the 5th of April, three days after the date of the letter) was antedated to the 2d of April, and that the "Sarah" was referred to as "now lying in the harbor of Boston," show that the parties intended the charter-party should have a retrospective effect to the 2d April, and the time of the "Sarah" leaving Boston. 4. But, independent of any expressed intention appearing in evidence, the court is bound, as matter of law, to treat the charter-party as containing the whole contract, and as merging all the prior negotiations between the parties. (2 Kent's Com., 556; Greenleaf's Ev. § 275, 276; *Mumford v. McPherson*, 1 Johns. 414; *La Farge v. Rickert*, 5 Wend. 187; *Barclay & Livingston v. Hohn*, decided in U. S. District Court by Judge Betts, 1852; Cowen & Hill's Notes to Phil. Ev. 2d part, page 593, Note 295, and cases cited.)

BY THE COURT. DUER, J.—The question which directly arises upon the pleadings is, whether the charter-party set forth in the answer, and admitted by the reply, must not be held to contain the whole agreement of the parties, upon the subject to which it relates, and, consequently, to have superseded entirely the prior agreement set forth in the complaint, upon the alleged breach of which alone this action is founded. Upon this question we had some doubts upon the argument, but are now satisfied that the necessary legal construction of the charter-party is that, which has been stated, and that the complaint was, therefore, properly dismissed.

The argument, upon the part of the plaintiff, rests wholly upon the assertion, that the charter-party covered only the voyage from Baltimore to Havre, and embraced no stipulation whatever relative to the intermediate voyage from Boston to Baltimore. The prior agreement, that the vessel should pro-

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ceed without delay from Boston to Baltimore, it was insisted, was distinct and independent, and as it was entirely consistent with the terms of the charter-party, that, so far from being superseded and extinguished, it retained all its original force. The plaintiffs had, therefore, an unquestionable right to maintain an action for its violation.

It was, however, very properly admitted by the learned counsel for the plaintiffs, that had the charter-party contained an express stipulation that the vessel, for the purpose of receiving her cargo, should proceed within a reasonable time, or without an unreasonable delay, from Boston to her port of lading, no evidence of the prior agreement, without a departure from the established rules of law, could have been received. The conclusion, it was admitted, could not then have been resisted, that the charter-party embraced the whole contract of the parties, and that the plaintiffs could maintain no action not founded upon a breach of its provisions. It is, therefore, upon the mere silence of the charter-party, the absence of any express provision relating to the voyage from Boston, that the right of the plaintiffs to maintain the action confessedly depends.

We are, however, clearly of opinion, that the inference which has been drawn from this silence of their written contract, that the parties meant to be governed in part by their prior agreement, is wholly unwarranted. The true inference is, that they were willing to abide by the construction which they knew the law would give to their contract, and deemed it unnecessary to insert a provision, which would have expressed no more than, in its absence, the law would certainly imply. It cannot be doubted, we apprehend, that in the absence of a positive stipulation, the legal construction of a charter-party is that the voyage described shall be commenced without unreasonable delay; and the law, with some exceptions created by usage, is settled, that evidence to alter the legal construction of a written contract can no more be admitted than to contradict or vary its positive terms. The position, therefore, upon which, as has been stated, the whole case of the plaintiff is rested, we must hold to be groundless. It is not true that the charter-party was confined to the voyage from Baltimore

to Havre. It was known to the parties, and is so stated in the charter-party itself, that the ship was then lying in the harbor of Boston, and, consequently, that she must proceed from that port to Baltimore in order to commence her stipulated voyage. This necessary coasting voyage was therefore as much in the contemplation of the parties as the outward voyage to Havre, and was just as certainly within the scope and provisions of their contract; for, although not embraced by its terms, it was so; by its reasonable and legal construction. The contract imposed it as a duty upon the defendants to cause the vessel to proceed, without unnecessary delay, from Baltimore to Havre, and the performance of this duty necessarily involved that of causing her to proceed, without unnecessary delay, from Boston to Baltimore. If this delay at Boston has, in fact, occurred, the plaintiffs may be entitled to recover the damages they may have sustained in an action upon the charter-party itself, but they cannot be entitled to recover them in an action upon an agreement, which, by the subsequent conclusion of the charter-party, was wholly extinguished.

To prove that the legal construction of the charter-party is that which we have stated, we shall content ourselves with referring to the single case of *McAndrew v. Adams* (1 Bing. N. C. 29), which, stamped as it is with the approbation of Lord Tenterden (Abbott on Ship. 255), we regard as a decisive authority. In that case, the defendant, the master of the ship, had agreed by charter-party to go in ballast from Portsmouth to St. Michael's in the Azores, and bring back a cargo of fruit direct to London. The charter-party was dated on the 20th of October, and contained no stipulation as to the time within which the voyage from Portsmouth should be commenced, but the court held that the absence of such a provision did not affect the right of the plaintiff, the charterer, to recover the damages it was alleged he had sustained from an unnecessary delay in the commencement of the voyage, and it appearing that it was not in fact commenced until the 6th of December, the delay, taking into consideration all the circumstances of the case, and particularly the nature of the trade, was adjudged to be unreasonable. It is evident that the voyage from Portsmouth in that case bears an exact resemblance to the voyage

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from Boston in the present; it was not a voyage on which any part of the freight was to be earned, but was necessary to be performed, to enable the vessel to take on board her stipulated cargo.

The proposition that the legal construction of a contract in writing, upon a question in relation to which its terms are silent, cannot be varied by evidence of an inconsistent agreement, prior or contemporaneous, is sustained by two express decisions of our Supreme Court, which we hold ourselves bound to follow. In *La Farge v. Richert* (5 Wend. 187), the defendant had bound himself in writing to deliver certain portable goods to the plaintiff on or before a certain day, but no place for the delivery was mentioned in the contract. The defence was, that by the parole agreement of the parties the goods were to be delivered on the premises of the defendant, and that on the appointed day this delivery was actually tendered. This defence was, however, overruled by the court, upon the ground that the construction which the law gave to the contract required the delivery to be made at the residence of the plaintiff, and that this construction could not be varied by the evidence that was offered.

In *Creevy v. Holly* (14 Wend. 26), the action was brought by a shipper against the owners of the vessel, for the loss of goods stored upon deck; and the claim was resisted upon the ground that, by the express understanding of the parties, the goods in question were to be carried on deck.

It was, however, held by the court, that the bill of lading, which was the proper evidence of the contract, by its legal construction, although not by its terms, imposed it as a duty upon the defendants to transport the goods under deck; and Ch. J. NELSON said, that as "such was the judgment of law upon the contract, parole evidence was just as inadmissible to alter it as if the duty had been imposed by express terms."

We are deeply convinced of the wisdom of the law in excluding all evidence of prior declarations or agreements of the parties when their final contract has been reduced to writing (2 Kent's Com. 556; 1 Greenleaf on Ev. § 275); and we are not at all disposed to weaken the force of the rule by creating an arbitrary exception. We think we should create such an

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exception by admitting the right of the plaintiffs to maintain their present action, and must therefore affirm, with costs, the judgment at special term, dismissing their complaint.

HICKS & another v. MCGROARTY.

In an action by the voluntary assignees of an insolvent, to recover the price of goods sold by the debtor to the defendant, the latter cannot set-off a promissory note from the insolvent to himself, which was not due at the time of the assignment, although it became so before the suit was commenced.

(Before OAKLEY, Ch. J., CAMPBELL and EMMET, J.J.)

June 8; June 11, 1853.

THIS action was brought by the plaintiffs, as the assignees of the firm of Thompson and Co., to recover the sum of \$228.87, with interest, for goods sold and delivered by T. & Co. to the defendant. The answer did not deny the sale, but claimed to set-off a promissory note from Thompson & Co. to the defendant, for \$653.70, dated May 16th, 1851, payable seven months after date. The credit for the goods expired on or before the 18th of December, 1851. The promissory note fell due on the day following.

The action was tried before Mr. Justice PAINE and a jury, on the 12th October, 1852.

The plaintiffs gave in evidence a deed of assignment, bearing date September 20, 1851, made by Henry G. Thompson and Joseph A. Dean, composing the firm of Thompson & Co., transferring all their property and effects to the plaintiffs upon trust, to convert the assigned estate into money, and to apply the proceeds, after defraying the expenses of the trust, First, to satisfy the indebtedness of the assignors to the firms of Brown, Brothers, & Co., and Hicks & Co.; Second, to pay the liabilities of the assignees to F. S. & D. Lathrop & Co., and F. S. Lathrop & Co., and the debts for which those houses were responsible for the said assignors; Third, to pay all the other

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debts of said assignors, paying the respective creditors ratably in case of a deficiency to pay in full; and, lastly, to return the surplus, if any, to the assignors. The plaintiffs then proved that the interest on the items of indebtedness mentioned in the complaint, amounted to thirteen dollars and eighty-one cents, and rested their case.

The defendant then gave in evidence the promissory note of Thompson & Co., for six hundred and fifty-three dollars and seventy cents, mentioned in his answer, and called as a witness,

John Jackson, who testified as follows: I was, in 1851, and am now, a clerk of the defendant. The note of Thompson & Co. for six hundred and fifty-three dollars and seventy cents, now produced, was given for goods purchased by them of the defendant. The goods had been previously purchased at different times, and the note was given for the aggregate amount of the bills. The witness further testified as follows—(the plaintiffs' counsel objecting to the evidence as inadmissible under the pleadings, and the court reserving the objection)—Previous to the first item in the account for which this note was given, there had been frequent dealings between Thompson & Co. and the defendant—buying of goods by Thompson & Co. of McGrorty, and by McGrorty of Thompson & Co. The items for which this note was given were in continuation of that account. Subsequent to the date of the note, I think there were purchases by Thompson & Co., of McGrorty, which formed the subject of book account.

Cross-examined.—I feel well satisfied there were such purchases as mentioned at the close of my direct examination, but will not swear positively that there were. I cannot recollect the amount or date. Such purchases, if any there were, were settled for by deducting the amount of them from some indebtedness of McGrorty to Thompson & Co. for goods purchased of them, a note being given to Thompson & Co. for the balance.

The defendant then rested, and the plaintiffs called *Rene Martin*, who testified as follows: I was the clerk and book-keeper of Thompson & Co., and am acquainted with the value of their assets, and the amount of their indebtedness at the

time of their assignment to the plaintiffs. The assets embraced in the assignment are not sufficient to pay the indebtedness to Brown, Brothers, & Co., and Hicks & Co.

Cross-examined.—I am not prepared at present to state the amount of the assets, nor of the debts of the first class of creditors; but they are large, and the assets will not pay the first class. The assets passed into the hands of the assignees, and I suppose they hold them. I cannot state what proportion of the debt to Brown, Brothers, & Co., nor what proportion of the whole indebtedness of Thompson & Co., fell due prior to the 19th of December, 1851. I cannot state the amount of assets—cannot state the amount due to the preferred creditors. I cannot tell what proportion of all the claims were due, or to become due, at the date of the assignment; cannot tell what was due, or to become due, on the 19th December, 1851.

The testimony being closed, the jury, by consent of the parties, found a verdict for the plaintiffs for two hundred and forty-two dollars and forty-eight cents, subject to the opinion of the court upon a case to be made, with liberty to either party to turn the case into a bill of exceptions.

W. M. Evarts, for the plaintiffs, now moved for judgment upon the verdict, and supported the motion as follows.

I. The debt from the assignors of plaintiffs not being presently due and payable at or before the time of the assignment, cannot be set off in this action. (2 R. S. 354, § 18, sub. 8; *Watt v. The Mayor, &c.*, 1 Sandf. S. C. R. 23.)

II. The fact that plaintiffs are assignees for the benefit of creditors does not enlarge the defendant's right of set-off. The right is created by statute, and in terms defined, and no extension or variation of the rule is prescribed in the case of suits by voluntary assignees for the benefit of creditors. (*Spencer v. Barber*, 5 Hill, 568.) The proof shows that the assignors' right is extinguished, the debt exceeding the assets. The plaintiffs' right is that of the preferred creditors, who, in respect of equity, stand in the same position as if the defendant's debt had been assigned to them directly. (*Johnson v. Bloodgood*, 1 Johns. case 51; Kent J., p. 54.)

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J. Cochrane, for defendant, opposed the motion, and claimed judgment for the defendant upon the following grounds.

I. The note claimed by defendant to be set off against the plaintiff's claim, grew out of an account, of which the claim of the plaintiffs was a part. The equities, therefore, between the parties, are superior to those of the creditors.

II. The evidence does not disclose that there were not sufficient assets to pay all the indebtedness of Thompson & Co. actually due on the 19th day of December, 1851. Therefore, the equities of creditors are shown to exist.

By the Court.—The proof is satisfactory, if not conclusive, that the assets of Thompson & Co. will be wholly insufficient to satisfy their debts, and we therefore think that the plaintiffs are entitled to the same protection as assignees for value against the set-off which is claimed. The defendant, as against them, had no subsisting equity when the assignment was made; not only was the note held by him, not due at that time, but it did not become due until he had become liable to the plaintiff.

Judgment for the plaintiffs, with costs. (*Vide Keep v. Lord*, ante p. 78.

PAINE and others v. SMITH, Administrator, &c., of HUNT, dec.

When no other ground of demurrer is meant to be relied on than the insufficiency in law of the matters set forth in the complaint to maintain the action, it is specified as distinctly as can be required, in the words of the Code, "That the complaint does not state facts sufficient to constitute a cause of action."

When an order for the resale of mortgaged premises is made in a foreclosure suit on account of A B, as the first purchaser, and requiring him to pay any difference in price, no action can be maintained on the order against C D, on the ground that he was the real purchaser. The order concludes the owners of the fee.

(Before OAKLEY, C. J., CAMPBELL and EMMET, J.J.)

June 8; July 2.

APPEAL from an order at special term, allowing a demurrer to the complaint.

The complaint is in the following words:

John Paine, James Phalen, and John M. Bixby, plaintiffs, complain that Adon Smith, administrator of the goods and chattels, &c., of Jonathan Hunt, late of New York, deceased, defendant, refuses to pay unto the plaintiffs the sum of two thousand two hundred and forty-two dollars and ninety-two cents, with interest from the 16th day of October, 1846, due and owing unto said plaintiffs by said Jonathan Hunt, in his lifetime, and by Adon Smith, as administrator, &c., in manner following:

For that in his lifetime, to wit, on the 9th day of May, 1846, Jonathan Hunt purchased, at a sale made under and in pursuance of a decretal order or decree in a certain suit then pending in Chancery, before the Vice-Chancellor, entitled, "John J. Palmer, Special Receiver, v. Isaac M. Woolley and Matilda D. his wife, and others," certain portion of the premises mentioned and described in said decretal order or decree, bidding for the same by his agent, Jeremiah Lathrop, and causing the said premises to be struck off to one Adon Smith, and that said Jonathan Hunt, after paying, through his agent, Jeremiah Lathrop, the ten per cent. and auctioneer's fees, according to terms of said sale, then and there failed to comply with said terms of sale and complete his said purchase, but forfeited his said ten per cent., whereupon a motion was made in the above mentioned cause or suit so pending for a re-sale, which was granted, and amongst other things ordered that on said re-sale the surplus of said re-sale, after paying the amount bid on said re-sale, interest, cost and charges, be paid over to said Jeremiah Lathrop, and that the deficit, if any, be paid by said Jeremiah Lathrop; and that at said re-sale, according to the Master's report thereon made the 8th day of October, 1846, and confirmed the 16th day of said month, there was a deficiency upon said re-sale of \$2,242.92 $\frac{1}{8}$, which is still due and owing to the plaintiffs, they then being the owners in fee of the said property, after satisfying liens thereon. Whereupon the said plaintiffs demand judgment against the said defendant, as administrator of the goods, chattels, &c., of Jonathan Hunt, deceased, for

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two thousand two hundred and forty-two dollars and ninety-two cents, with interest thereon from the sixteenth day of October, one thousand eight hundred and forty-six.

The demurrer stated no other ground of objection, than that the complaint "did not state facts sufficient to constitute a cause of action."

Mr. J. CAMPBELL, by whom the case was heard at special term, ordered that the demurrer should be allowed and the complaint dismissed with costs, unless the plaintiffs should within 20 days amend their complaint and pay the costs of the demurrer—and it was from this order that the appeal was taken.

A. Clason for the plaintiffs and appellants.

I. The demurrer is bad under the Code, because it specifies no defect. (How. Practice R. vii. 278; do. vi. 361.)

II. The complaint is good upon demurrer. It states a contract with the court, to the benefit of which the plaintiffs are entitled; that one Lathrop, the ostensible contractor, was not the real party in interest, and that the intestate is the real party in interest.

III. Before the Code, the present plaintiffs could have filed a bill to set in motion the former order.

W. M. Everts for defendant.

I. The complaint shows no contract by defendant's testator with the plaintiffs, for the purchase of any lands. (2 R. S. 135. §§ 8, 9. *Townsend v. Hubbard*, 4 Hill, 351; *McWharter v. McMahon*, 10 Paige, 393; *Coles v. Bowne*, ib. 537.)

II. It shows no conveyance to him, nor offer to convey, nor any excuse for such omission.

III. It shows the purchase to have been made by another person, to wit, Lathrop.

IV. It shows that the default of the purchaser at the Chancery sale was judicially disposed of in the suit, by the court having jurisdiction; and that the defendant's testator was not held as purchaser by the court. This is an adjudication of the

whole matter. (*Strong v. Dollner*, 2 Sandf. Sup. Ct. R. 444; *Brown v. Frost*, 10 Paige, 247.)

By THE COURT.—We are all of opinion that the order appealed from must be affirmed with costs.

The demurrer is not bad upon its face; for, when no other cause of demurrer is meant to be relied on than the insufficiency in law of the facts set forth in the complaint, to maintain the action, no other is necessary to be assigned, and it is properly assigned by following the words of the Code: "That the complaint does not state facts sufficient to constitute a cause of action." Section 145, in requiring the grounds of objection to the complaint to be distinctly specified, only means that the demurrer shall specify distinctly one or more of the six causes of demurrer, which are enumerated in § 144. So far as this court is concerned, this question must be considered as settled.

The facts set forth in the complaint are certainly not sufficient to entitle the plaintiffs to maintain the action. Passing over other objections, we cannot doubt that the plaintiffs are concluded, by the order in the foreclosure suit, which required the deficit, that they now seek to recover, to be paid, not by the intestate, but by Jeremiah Lathrop. If it was then known to the plaintiffs that Hunt was the real purchaser, and Lathrop merely his agent—and they desired that Hunt should be personally liable for a deficiency on a re-sale, the order should in terms have required the payment to be made by him. The complaint does not allege that the plaintiffs were then ignorant of the fact that Hunt was the purchaser, and we have no right to presume that they were so.

It is not very probable that this complaint can be so amended as to enable the plaintiffs to maintain the action; but, in affirming, with costs, the order appealed from, the liberty of amending, within the usual time and upon the usual terms, will be continued to them.

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When cattle, sold without a warranty, are found, when slaughtered, to have been bruised, and the seller for that reason makes a deduction from the original price, and accepts a less sum in satisfaction, he is bound by the settlement—the equity of the deduction makes it a good accord and satisfaction.

When the claim of a creditor is disputed in good faith, and to settle the dispute he abates a part of his demand, the settlement, as a compromise, is valid and binding, although he was not legally bound to make the abatement.

An agent, having a discretionary power to sell goods and collect the price, has an implied authority to make any deduction from the original price that could have been made by his principal.

Judgment for defendants, with costs.

(Before OAKLEY, Ch. J., CAMPBELL & EMMET, J.J.)

June 9; June 11, 1858.

CASE on verdict, subject to the opinion of the court at general term.

The action was tried before Mr. Justice BOSWORTH and a jury on the 8th of March, 1853. The pleadings are as follow.

NEW YORK SUPERIOR COURT.—CITY AND COUNTY OF NEW YORK.—*Eli O. Taylor v. Philip Nussbaum & Julius Strauss.*—The complaint of Eli O. Taylor, the above-named plaintiff, shows to this court, that, at the city of New York, on or about the 1st day of April, 1851, he sold and delivered to Philip Nussbaum and Julius Strauss, the above-named defendants, twenty head of cattle, for which said defendants promised and agreed to pay the sum of fifty dollars per head; that said defendants have since said sale paid on account of such cattle the sum of nine hundred and eleven dollars, and that said defendants are still indebted to him, the said plaintiff, for a balance of the moneys agreed to be paid for said cattle, in the sum of eighty-nine dollars, for which amount, with interest from the first day of April, 1851, the said plaintiff claims judgment against the said defendants.

Eli O. Taylor v. Philip Nussbaum & Julius Strauss.—City and County of New York, ss. September 7, 1852.—Said

defendants, by A. J. Perry, their attorney, answering the complaint in this action, say, that the said sum of nine hundred and eleven dollars so by them paid to plaintiff, by reason of such purchase, was paid by these defendants, and was received by said plaintiff as and for a full and complete accord and satisfaction of any and all claim and demand whatever, which the said plaintiff had against these defendants by reason of the sale and delivery of the cattle mentioned in the complaint.

Defendants further answering, say, that in the course of their business they slaughtered the said cattle, and then first discovered that the said cattle had been much bruised, which bruising greatly injured the beef, causing these defendants much damage, and that it was in consideration thereof that the said plaintiff agreed to take, and did take, the said sum of nine hundred and eleven dollars in full satisfaction of his said original claim and demand of one thousand dollars for the said cattle.

Upon the opening of the case, the counsel for the plaintiff moved for judgment on the pleadings.

The court reserved its decision on such motion.

The defendants' counsel then called as a witness,

Max Doctor, who, being sworn, testified as follows:—I know the plaintiff; I am in the employ of the defendant Nussbaum; the defendants bought from the plaintiff the cattle in question; I saw the cattle after they were slaughtered; the beef was in bad condition; the cattle were slaughtered the same day they were purchased; I was present at a conversation between plaintiff and defendant Nussbaum; this conversation took place in the street after the cattle were slaughtered; we met the plaintiff, and Nussbaum told plaintiff the cattle were bruised; plaintiff said he had nothing to do with it, that Belden collected the bill; what he threw off the plaintiff would be satisfied with; one thousand dollars was the price to be paid for the cattle; I know Belden; I have a receipt for money paid Belden for the cattle; I have seen Belden write; I know his handwriting; the receipt now shown me is in his writing.

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The receipt was here read in evidence, and is in the words and figures following, to wit :

New York, April 23d, 1851.

Received of Philip Nussbaum and Julius Strauss, nine hundred and eleven dollars, in full settlement and satisfaction, for twenty head of cattle, sold by Eli O. Taylor to them on the 1st day of April, 1851, for the sum of \$1,000 00.

W. H. BELDEN.

\$911 00

I don't recollect that I was present when the money was paid.

On being cross-examined, the witness further testified: I believe the plaintiff lives in Albany; I saw him before the sale; I don't know who was present at the sale except the plaintiff and defendants; I don't know as Belden was; I understand the sale was made by plaintiff; the conversation above referred to took place a week after the sale; myself, plaintiff, and Nussbaum were the only persons present at the time of the conversation; Taylor knew we were dissatisfied with the cattle; Taylor said I suppose Belden will do what is right; whatever Belden would do he was satisfied with; I did not see plaintiff afterwards; saw Belden and defendants together after conversation; can't recollect that I saw Belden sign the receipt; Belden called at slaughter-house once or twice; saw Belden at slaughter-house after conversation; the first time I saw Belden at slaughter-house, he would only allow \$50 for bruises; I was not present when Belden called the second time; Belden said he was authorized by plaintiff to do what was right; he said he would allow what was right; Belden and defendant did not agree at that time as to the amount to be deducted; I was not present at the time of the sale of the cattle to defendants; the sale was not made the day the plaintiff first called at the slaughter-house; the cattle were not in the city then; the sale was made the next day.

On being again directly examined, said witness further testified: I heard Belden and defendants talk about amount of deduction to be made; Belden would not allow more than

\$50; this was after defendant had conversation with plaintiff in the street; defendants wanted \$150 deducted for cattle being bruised; Belden on this occasion stated that he had seen plaintiff, and plaintiff had told him to make a deduction of every thing that was right; when defendant made remark about deduction of \$150, Belden offered him \$50; defendant said he could not stand it; it was not enough; this was a few days after the conversation with plaintiff in the street.

The defendants here rested their case.

The plaintiff then called as a witness,

William H. Belden, who, being sworn, testified as follows: I know the plaintiff and defendants; I was the agent for the plaintiff for the sale of the cattle in question; my brother, who is my partner, sold the cattle to defendants; I can't say whether the plaintiff was in the city at the time of the sale; he was in the city a day or two before the sale; two weeks after the sale I called on the defendants to collect the bill; I saw Nussbaum; I can't say whether or not the last witness was present when I called; I asked Nussbaum to pay the bill; he refused to do it; he wanted a deduction from the bill for the cattle being bruised; I do not know how much he wanted deducted; did not agree on the amount to be deducted at the first interview; I did not make an offer until I had seen Taylor; I can't tell whether I mentioned Taylor's name; I saw plaintiff afterwards, and before the defendants paid me; plaintiff never authorized me to make any deduction; I made the deduction myself on my own responsibility, as I wanted to get the money; defendants refused to pay the whole bill, and I deducted \$90; I sold the cattle for plaintiff on commission; myself and brother were partners; I never at any time told Nussbaum, or any other person, that plaintiff had authorized me to make any deduction whatever.

On being cross-examined, the witness further testified: I had made deduction on cattle sold before; I never made any deduction on cattle sold by us for plaintiff; I had done so on my own sales.

The defendants' counsel proposed to show that witness had frequently made deductions on bills for cattle, when the cattle

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had, after slaughtering, been found to be bruised, for the purpose of showing that it was the usage of persons collecting bills for cattle to make deductions.

The plaintiff objected to the testimony, and the court sustained the objection, to which the counsel for the defendants excepted.

The testimony was here closed, and the cause submitted.

The counsel for the plaintiff requested the court to charge the jury, that the evidence did not show a legal authority in the witness Belden, as agent for the plaintiff, to accept a less sum than the contract price for the cattle, and that notwithstanding the payment of such sum, and the receipt of the same by said Belden, in full payment of the contract price, the plaintiff was entitled to a verdict.

The court hereupon charged the jury that the evidence produced was sufficient to show a legal authority from the plaintiff to Belden, to accept the sum paid in full of such contract price, and the jury found the following facts, subject to the opinion of the court at general term, upon the question of the plaintiff's right to recover, notwithstanding such payment and receipt.

The counsel for the plaintiff excepted to that portion of the charge of the court, wherein the court charged that the evidence produced was sufficient to show a legal authority from the plaintiff to Belden, to accept the sum paid in full of the contract price, and desired the court to note such exception.

The jury thereupon found—

First, That after the sale and delivery of the cattle, defendants paid to William H. Belden the sum of \$911, which sum the said Belden agreed to accept in full payment of the said cattle, by reason of the same having been found bruised when slaughtered.

Second, That said Belden was legally authorized by the plaintiff to accept such sum in full payment of the contract price of the cattle.

The jury hereupon, by direction of the court, and with the consent of the parties, rendered a verdict in favor of the plaintiff, for the amount claimed by the complaint, with interest, \$100.96, subject to the opinion of the court at general term,

on the questions of law arising in the case, with liberty to the court to dismiss the complaint.

J. B. Scoles, for plaintiff, moved for judgment on the verdict, and insisted on the following points.

I. The question, whether the evidence produced was sufficient to show a legal authority from the plaintiff to Belden, to accept the sum paid in full of the contract price, was a question of fact, and ought to have been submitted to the jury.

II. The plaintiff never gave Belden authority to accept the sum paid, in full of the contract price. He himself says, "Plaintiff never authorized me to make any deduction. I made the deduction myself, on my own responsibility, as I wanted to get the money. Defendants refused to pay the whole bill, and I deducted \$90."

III. There was no contract or agreement between plaintiff and the defendants, that Belden should make this deduction from the bill. Even if the testimony of Max Doctor be credible, the reasonable and legal interpretation of the conversation between plaintiff and defendants is, that he, the plaintiff, would be satisfied with whatever Belden should do in the shape of a deduction, provided the defendants had a legal right to any deduction from the contract price. The sale was made by Belden, who alone knew the terms and conditions of sale. The alleged conversation between the defendants and Belden upon this subject, contained in Doctor's testimony, is in harmony with this view—if there was a contract or agreement between plaintiff and defendants, that Belden should make any deduction he pleased, whether the defendants had a legal right to it or not, it would be, without consideration, a *nudum pactum*, and of no binding obligation.

IV. Had Belden been legally authorized by the plaintiff to accept a smaller sum than the contract price, in full payment of the contract price of the cattle, his acceptance of such smaller sum does not deprive the plaintiff of a right of action for the balance. The payment of part is no satisfaction of the whole. There was no legal consideration for the deduction. The defendants had no legal claim to any deduction from the

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contract price. The doctrine of *caveat emptor* applied to the bruised condition of the cattle. There was no warranty of soundness. There is no pretence of fraud. The payment made was not a good accord and satisfaction. (*Johnson v. Brannan*, 5 Johns. 269; *Seymour v. Minturn*, 17 Johns. 169.) That the doctrine of *caveat emptor* applies to the sale of the cattle, see Hilliard on the Law of Sales, 224; Fitzherbert's N. B., 94 c.

J. Cochrane, for defendants, claimed that judgment should be entered in their favor, and argued as follows.

I. The answer alleges, that in consideration of the damage suffered by the defendants, on account of the cattle having been bruised, the plaintiff agreed to settle, and did settle his claim at a less sum than he originally demanded. The evidence proves the allegation. This is no answer of an accord and satisfaction, but of an agreement between the parties to settle, and a settlement.

II. The insufficiency of a smaller sum to cancel a greater, pleaded in form of an accord and satisfaction, proceeds on the ground of the palpable inadequacy of the less to the greater sum. (*Walkman v. Ingleby & Stoke*, 5 John. R. 386, 391, and cases cited.) If, in addition, however, to the less sum paid, any other consideration is shown from which the court can see that a benefit could be derived to the plaintiff's satisfaction, that makes the payment of the smaller sum good as an accord and satisfaction. As, if the less sum be paid at a different place, or before the day agreed (*Walkman v. Ingleby*, supra; *Fitch v. Sutton*, 5 East's R. 230). If the amount is disputed, the acceptance of a sum smaller than the demand, is a good accord and satisfaction (*Palmerton v. Huxford*, 4 Denio, 166). The answer and the evidence in this case both show that the amount was disputed, and that in consideration of the cattle having been bruised, \$89 were thrown off in settlement.

By THE COURT.—We are all of opinion that upon the facts found by the jury, the defendants are entitled to judgment.

Admitting that the cattle were not sold under a warranty, express or implied, as to their soundness, and that the defend-

ants had, therefore, no legal right to claim a deduction from the stipulated price; the deduction was, however, just and equitable in itself, and its equity is a sufficient consideration for its allowance. It is sufficient to exempt the case from the general rule, that the payment of a less sum than the amount of the debt is not a good accord and satisfaction.

But it is not alone upon this ground that we place our decision. We apprehend that it is settled law, that when the claim of a creditor is disputed in good faith, and in order to settle the dispute he consents to abate a portion of his demand, the settlement, as a compromise, is valid and binding. Nor will the court inquire in such cases, whether he was legally bound to make the sacrifice. We deem it needless to refer to cases to show that such is the rule. It is sufficient to say that it was the ground of the decision of this court in *Currie v. Steele*, 2 Sand. S. C. R., p. 542. There is no reason here to question the good faith of the defendants. They doubtless believed that they were entitled to the deduction which they claimed.

The only question that remains is, whether the agent, Belden, had authority to make the deduction. It is said that this question ought to have been submitted to the jury. As we read the case, it was submitted to the jury, and their finding, if there was any evidence to support it, is conclusive. The testimony of the witness, Doctor, was sufficient to support it; and supposing him to have been contradicted by Belden, whether he or Belden was to be believed, it was for the jury to determine.

But, in truth, it was not necessary that the question of the agent's authority should have been submitted to the jury at all. His authority resulted from the nature of his agency; he had a general authority to sell and collect the price. The amount to be paid rested, therefore, in his discretion, and he exercised this discretion in making the settlement which he did. The sum paid to him he consented to receive as the full price to which he was entitled.

As the facts in this case have been specially found by the jury, the Code makes it our duty to render such a judgment as the finding warrants (§ 262). The verdict for the plaintiff must, therefore, be set aside, and a verdict and judgment thereon with costs, be entered for the defendants. They ought not,

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by a mere dismissal of the complaint, to be subjected to the risk of a second action.

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It rests wholly in the discretion of the judge who tries a cause whether he will permit the pleadings to be read to the jury.

When the issues raised upon the pleadings are irrelevant or immaterial, the judge is not bound to submit them to the determination of the jury, and may therefore withhold from the jury the pleadings in which they are contained.

In an action of assault and battery, causes of provocation cannot be admitted in evidence in mitigation of damages, unless they happened at the time of the assault, or immediately preceding it, so as to form part of one transaction.

In such an action, proof of the general character of the plaintiff cannot be received in mitigation of damages.

Exceptions overruled; judgment for plaintiff affirmed, with costs.

(Before OAKLEY, Ch. J., CAMPBELL and EMMET, JJ.)

June 18; July 2.

APPEAL by defendants from a judgment at Special Term, in favor of plaintiff, for \$2,852.29. A bill of exceptions was attached to the record.

The action was for an assault and battery, committed by the defendant on the plaintiff, in the month of June, 1850.

The defendant, in his answer, admitted that he had inflicted several blows upon the plaintiff, at the time and place mentioned in the complaint, but denied that he had done so without provocation. The answer then proceeded to set up as a full justification and defence, and with details unnecessary to be stated, that the plaintiff's conduct towards him, the defendant, had been uniformly treacherous, cowardly and false; that he had availed himself of the defendant's hospitality as a means of destroying the defendant's tranquillity of mind, and the dignity and purity of his wife; that he had pursued a system of stealthy and secret intercourse with defendant's wife; had taken with her unworthy and criminal liberties, and had introduced habits of debauchery into the defendant's household; that the

plaintiff had also caused to be published in a newspaper edited by himself, called the "Home Journal," and also in the "New York Daily Herald," several false and atrocious libels upon the defendant's character and conduct, and the answer concluded with averring that it was under a burning sense of the wrongs thus done to his honor, happiness and character, that he, the defendant, had inflicted upon the plaintiff the chastisement admitted, and insisted that the plaintiff was not entitled to any damages whatever; but that judgment should be given for him, the defendant, with costs. The reply of the plaintiff, after averring that the allegations in the answer were entirely irrelevant, and constituted no defence to the action, proceeded to controvert the same in detail, raising thereon several distinct and plainly immaterial issues.

Upon these pleadings the cause came on to be tried before Mr. Justice Bosworth and a jury, on the 1st March, 1852.

The proceedings on the trial are stated in the bill of exceptions, as follows :

Anne Herrick was sworn as a witness for the plaintiff, 117 and testified, that she was present at the collision referred to in the pleadings, and gave evidence in relation thereto; the counsel for the plaintiff examined various other witnesses to prove the issue on his part, and other proceedings took place as follows:

Lewis F. Warner was sworn as a witness for the plaintiff, and testified, that he was a physician, and had been the family physician of the plaintiff for three years, that he had heard of the occurrence of an affray between. 118 Mr. Forrest and Mr. Willis,—testified to by the former witnesses.

The counsel for the plaintiff then asked the witness this question.

What was the general state of Mr. Willis's health at that time?

The counsel for the defendant objected to the testimony as irrelevant and improper.

His honor the judge overruled the objection, and the counsel for the defendant excepted to the decision.

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- 119 The witness testified,—Mr. Willis was in a delicate state of health from various causes; he was debilitated from a severe attack of rheumatic fever; he was then in a convalescent state; I can't say how long he had suffered; it was at least a year previous; I had prescribed for him only occasionally during the year.

After further testimony from this witness, the plaintiff rested.

The counsel for the defence then opened the case on the part of the defendant, and offered to read the pleadings to the jury.

- 120 His honor, the judge, refused to allow the pleadings to be read, and overruled the offer.

The counsel for the defendant excepted to the decision.

The counsel for the defendant, to prove the issue on his part, then called

Mrs. Christina Underwood, who testified; I lived with Mrs. Forrest; I did not live with her in 1844 and 1845; but I was in the habit of going there; I called there two days before she went to Europe in 1844.

The counsel for the defendant then asked the witness this question.

- 121 Do you recollect Mr. Willis calling there shortly before Mrs. Forrest went to Europe?

The counsel for the plaintiff asked the object of this inquiry, whereupon,

The counsel for the defendant offered to prove by this witness and others, in mitigation of damages, criminal intercourse between the plaintiff and the defendant's wife, commencing in 1844 and continued until May, 1850, which had come to defendant's knowledge shortly before the collision aforesaid, and that the alleged assault and battery oc-

- 122 curred at the first meeting of the parties after such knowledge had come to the defendant.

His honor, the judge, overruled the offer, and excluded the testimony, and the counsel for the defendant excepted to the decision.

The counsel for the defendant then offered to prove, in mitigation of damages, the several causes of provocation set

forth in the answer of the defendant, and on which issue had been joined by the reply of the plaintiff.

But his honor the judge overruled the offer and excluded the testimony, to which ruling and decision the counsel for the defendant duly excepted. 123

The counsel for the defendant then called

Henry Dougherty, who testified as to the collision mentioned in the pleadings, and then deposed as follows: Mr. Willis walked to the police office after the affair; the office was in a market in the Sixth avenue.

The counsel for the defendant then asked the witness this question.

Did Mr. Willis make a complaint there? 124

The question was objected to, whereupon the defendant's counsel said, "I offer to show that the magistrate asked Mr. Willis if he had any complaint to make, and he said he had not, and they all walked off." This evidence was excluded as immaterial, and the question was overruled by his honor the judge, and the counsel for the defendant excepted to the decision.

The counsel for the defendant then offered to prove, in mitigation of damages, the publications annexed to the answer in the cause, and to give the same in evidence to the jury; and to prove further, in mitigation of damages, that at the time of each of the said publications, defendant was in the State of Pennsylvania, which was his place of residence; that he was in that State continually, with the exception of two days, until the time of the encounter, and had never seen the plaintiff from the time of the publication until that of the collision. 125

The counsel for the plaintiff objected to the testimony; the objection was allowed by his honor, the judge, and the testimony excluded.

The counsel for the defendant excepted to the decision. 126

After further testimony on the part of the defence, the counsel for the defendant called

Gideon O. Chase, who testified as follows: I reside in Owego; I have lived there since 1832; Mr. Willis, the

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plaintiff in this suit, resided there some four or five years; I was acquainted with him.

The counsel for the defendant then asked the witness this question.

Do you know his general character for integrity and morality?

127 The counsel for the plaintiff objected to the question.

The objection was allowed, and the testimony excluded.

The counsel for the defendant excepted to the decision.

The counsel for the defendant further offered to show, in mitigation of damages, the general standing in society of said plaintiff, which was objected to by the counsel for the plaintiff and excluded by the court, to which decision the plaintiff excepted.

Further testimony was then given on the part of the defendant.

The case was then closed on both sides.

The counsel for the defendant and plaintiff respectively summed up the cause to the jury.

The jury retired under the charge of his honor, the judge, and on their return found a verdict for the plaintiff for \$2,500 damages, and costs.

J. Van Buren, for defendant, now insisted that the judgment upon the verdict ought to be reversed, and a new trial be granted upon the following grounds.

I. The judge erred in refusing to allow the defendant's counsel to read the pleadings, in opening his case to the jury.

II. The plaintiff having joined issue upon the allegations of the answer, should have been compelled to try the issues thus framed. The court, by excluding the defence, in effect allowed the demurrer taken in the reply. This was erroneous, and in contravention of the established rule, that a party shall not both reply and demur to the same plea (*Slocum v. Wheeler*, 4 How. Pr. R. 373; *Spellman v. Weider*, 5 How. Pr. R. 5; *Rickert v. Snyder*, 5 Wend. 104; *Wheeler v. Curtis*, 11 Wend. 662; *Russell v. Rogers*, 15 Wend. 359).

III. The testimony offered should have been admitted. 1.

It is competent to show provocation, in mitigation of damages, in an action of assault and battery (*Lee v. Woolsey*, 19 J. R. 319 ; *Ellsworth v. Thompson*, 13 Wend. 663). 2. The qualifications of this rule that would limit the provocation to the time of the assault, are not sustained by principle or authority (*Frazer v. Grantly Berkeley*, 7 Car. & P. 621 ; *Rhodes v. Bunch*, 3 McCord, 66 ; *Dean v. Horton*, 2 McMullen, 147, 2 Gr. Ev. § 267). 3. Whether a sufficient interval had elapsed between the provocation and the punishment in this case, was a proper subject of inquiry for the jury.

IV. The testimony offered at fol. 123 and fol. 125, should have been received, [see reasons stated under point III.] There was also error in the refusal to allow the defendant's counsel to read and prove to jury the challenge or invitation suggested in the plaintiff's libel against the defendant (*Logan v. Austin*, 1 Stew. 476).

V. The testimony offered at fol. 124, should have been admitted. It served to show the extent of injury done to plaintiff, and to disprove his statement as to the manner in which he was assailed. And proof of Mr. Willis' admission, that he had no complaint to make, was competent (*Yost v. Ditch*, 5 Black. f. 184).

VI. This being a speculative suit, in which an enhanced rate of damages was claimed on the score of the personal position of the parties, and for injuries to the sensibilities, as well as to the body of the plaintiff, the offer to prove the standing of plaintiff in society should have been admitted. It was competent upon the question of damages (2 Gr. Ev. § 267 ; 2 Car. & P. 292 ; *Paddock v. Salisbury*, 2 Cow. 811).

E. Sandford, in resisting the motion, argued as follows.

I. The question put to Dr. Warner, as to the state of the plaintiff's health, at the time of the assault, was relevant, and was properly admitted.

II. The court properly refused to permit the counsel for the defendant to read the pleadings to the jury. All questions arising upon the pleadings are for the determination of the court. It was for the court to determine what issues joined in

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them were properly for the consideration of the jury; and what evidence was competent when offered in support of such issues (*Mitchell v. Borden*, 8 Wend. 570).

III. The evidence offered to be given by the witness Underwood, was properly excluded. It did not constitute any justification for the assault, or mitigate, or excuse it (fol. 121). (*Lee v. Wolsey*, 19 J. R. 319; *Ellsworth v. Thompson*, 13 Wend. 658; *Beardsley v. Maynard*, 4 Wend. 336, 55; *Maynard v. Beardsley*, 7 Wend. 560, 64).

IV. The offer to prove the several causes of provocation set forth in the answer of the defendant, and on which issue had been joined by the reply of the plaintiff, was properly overruled (fol. 122). [See cases cited under point III.]

V. The question put to Mr. Dougherty, whether Mr. Willis said at the police office that he had no complaint to make, was irrelevant, and was properly excluded (fol. 124).

VI. The offer to prove the publications annexed to the answer, and to prove the absence of the defendant from the State at the time of their publication, and that he had not seen the plaintiff from the time of publication until that of the assault, was properly overruled (fol. 125).

VII. The question put to the witness Chase, whether he knew the general character of the plaintiff for integrity and morality, was properly overruled (fol. 126).

VIII. The evidence offered, to show the general standing of the plaintiff in society, was properly excluded. No issue on this subject was raised by the pleadings; nor was the evidence offered relevant to any issue raised thereby (fol. 127).

IX. The judgment appealed from, should be affirmed, with costs.

BY THE COURT. CAMPBELL, J.—This was an action for assault and battery, tried before one of the justices of this court and a jury in the spring of 1852, and a verdict rendered in favor of the plaintiff for \$2500. A motion is now made on the part of the defendant, to set aside the judgment entered on the ground that the judge had erred in refusing the defendant permission to read the pleadings to the jury, and had excluded the evidence offered in mitigation of damages.

It was purely a matter of discretion with the judge whether he would allow the pleadings to be read. He might call upon the counsel to read them, or to state their substance, if it was necessary to enable the court to understand the issues which were raised and were to be tried. The pleadings, which are presumed to be statements in legal form of those facts, which constitute the charge or defence of the parties, are for the consideration of the court. When evidence for the consideration of the jury is offered, or given, to sustain or establish those facts, it becomes necessary for the court to understand what issues are raised, and which are properly triable in the case. The facts stated in the pleadings, except so far as admitted, could not be considered by the jury until proved by competent testimony. In this case there was a long answer, admitting the assault, but setting up various causes of provocation which had arisen at different periods previous. The reply took issue and denied these causes of provocation. Thus upon the face of the pleading as they stood when the cause was brought on for trial, issues were joined in a simple action of assault and battery, the disposition of which would call for inquiries into the history, conduct, standing in society, and grievances of these parties, and extending through a series of years. It is very manifest that the judge ought not to allow those issues to be tried in such an action. The correct practice, says Justice Barculo in a similar case (*Fox v. Hunt*, 8th Howard, Pr. R. 12), is at the circuit to lay out of the case all the irrelevant allegations, as well as the immaterial issues contained in the pleadings, and hold the parties to trial upon the material issues or points in the case. As most of the issues raised by the pleadings in this case could not be placed before the jury for their consideration, the judge, we think, very properly refused permission to the counsel to read the pleadings to the jury.

The evidence, which the defendant offered in mitigation of damages, and which was excluded by the judge, was not admissible. Whatever were the real or fancied causes of provocation, and which were offered to be proved, if they existed, they were known to the defendant a long time prior to the assault. They were not of recent occurrence, had not just come to the knowledge of the defendant, and especially did not happen at

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the time of the assault. In one of the oldest reported cases in this country, decided now nearly half a century ago (*Avery v. Ray et al.*, 1 Mass. Rep. 11), it was ruled that in an action for assault and battery the defendant may give in evidence in mitigation of damages, immediate provocation, such as happened at the time of the assault, but not such as happened previously. Mr. Justice Ledyard said in that case that he should be in favor of admitting evidence of provocation given in mitigation of damages upon a liberal scale, but to admit such evidence where the blood has had time to cool would be extending the rule so as to render it impossible to say where the court should stop.

In the leading case in this state, that of *Lee v. Woolsey*, 19 John. 319, Chief Justice Spencer remarked, "It appears to me neither to comport with sound policy nor law to allow an inquiry into antecedent facts in such a case as this, unless they are fairly to be considered as parts of one and the same transaction. A contrary course would greatly encourage breaches of the peace, personal rencounters, and every species of brutal force, and would tend to uncivilize the community." The rule as first laid down in this country, so far as we find in *Avery v. Ray*, prevails, with scarcely an exception, if indeed there is any, in all the states of this Union, and its justness and policy have been dwelt upon, and favorably considered, in a large number of cases. It is the established rule in this state, and has been followed and recognised in several cases decided since that of *Lee v. Woolsey*. We see no reason in this case to depart from it. There were some other minor questions raised, but which were not pressed at the argument, and which were of little moment. We think them correctly determined at the trial.

The judgment appealed from must be affirmed.

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In an action to recover damages for the wrongful detention of personal property it is not necessary to set forth the plaintiff's title in the complaint. A general averment of ownership is sufficient.

Under such a complaint a bill of sale from the former owner may be given in evidence.

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Where the goods are in the possession of a bailee of the vendor, the bill of sale gives an immediate and valid title to the purchaser, without a formal delivery of the possession. The possession of the bailee becomes that of the purchaser. Such a bill of sale is not merely a transfer of a right of action, but of the goods themselves, and gives an immediate right to the purchaser as owner to demand their restoration.

Where the bailee claims a lien, the claim must be positively made, and its nature, if not its amount, be stated.

When the claim is not so made, his refusal to deliver the goods is sufficient proof of a conversion.

Judgment for plaintiff.

(Before OAKLEY, Ch. J., CAMPBELL and EMMET, J.J.)

June 15; July 2, 1853.

THIS was an action to recover damages for the wrongful detention by the defendant, of certain articles of clothing, and stuff for clothing, alleged to be the property of the plaintiff.

The answer took issue on all the averments in the complaint.

The cause was tried before Mr. Justice Bosworth at the trial term for March, 1853. On the trial, Justus Uhlendorf, a witness on the part of the plaintiff, testified that he was a tailor, and that in December, 1851, he was in partnership with Mr. John Fracks, and that he and his partner kept a clothing store at No. 614 Water street, in the city of New York; that said store was burnt down in December, 1851, and part of the goods from the store was saved from the fire; that the goods saved were 24 coats; 36 pair of pants; 36 vests; a lot of silk and woollen stuffs for vests and pantaloons, and other materials for clothing: and that the value of the goods saved was about two hundred and fifty dollars; that the said goods were taken to the house of defendant, and that the house of defendant was about 200 yards from the place where the fire was.

Upon cross-examination he testified that after the fire he went to the defendant's house and saw the goods there; they were the same goods that had been in his store, and he examined and counted them.

James McGay, sworn on behalf of the plaintiff, testified that he was subscribing witness to a bill of sale (now produced) by Uhlendorf & Fracks to the plaintiff in this suit, and saw them

execute the same; which said bill of sale, he then and there produced, and offered to read the same in evidence; and thereupon the defendant's counsel, W. Allen, Esq., objected to the admission of the same, in evidence, because—

1st. The assignment, or bill of sale, was irrelevant, as its effect was to make the plaintiff an assignee of a thing in action, which fact was not averred in the complaint. And

2d. Because he averred that this suit having been brought for a wrongful detention of said goods, that the same was a tort, and was not assignable. His honor the judge overruled the several objections, and the defendant excepted. The bill of sale was then read in evidence, and was in the words and figures following:

“Know all men by these presents, that We, Justus Uhlendorf, and John Fracks, of the city of New York, of the first part, for and in consideration of the sum of fifty dollars, lawful money of the United States, to us in hand paid, at or before the ensealing and delivery of these presents, by Henry A. Heine, of the same city, of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, his executors, administrators and assigns, about 36 pair pants—buckskin, doe-skin, kerseymere and light goods; about 36 vests—silk and summer vests; about 24 coats—summer coats, pilot cloth coats and fine cloth coats; lot of silk stuffs for vests and woollen stuffs for vests; lot of pantaloons; lot of lining for coats; lot of alapaca, and some buttons—the same being the goods saved from the fire that took place in our store, in December last, and this conveyance being intended to cover all the property so saved, whether enumerated here or not. To have and to hold the same unto the said party of the second part, his executors, administrators and assigns for ever. And we do for ourselves, our heirs, executors and administrators, covenant and agree, to and with the said party of the second part, to warrant and defend the sale of the said goods hereby sold unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whatsoever. In witness whereof, we have hereunto set our hands and seals,

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the eighteenth day of June, in the year one thousand eight hundred and fifty-two.

"JUSTUS UHLENDORF. [L. s.]

"JOHN FRACKS, [L. s.]

"*Signed, sealed, and delivered* }
in the presence of

"The words 'and now at' erased before signing.

"Witness as to JOHN FRACKS,—JAMES MCGAY. As to J. UHLENDORF,—JAMES MCGAY."

The same witness then testified that a day or two before the commencement of this suit he went, in company with the plaintiff, to the house of the defendant, and took with him the bill of sale (above-mentioned), that he demanded the goods in question from the defendant for the plaintiff, and read the different goods off from the bill of sale to him, and that the defendant refused to give up the goods until he was paid for keeping them.

Upon cross-examination he testified that he showed and read the bill of sale to the defendant; told him I wanted the goods. Do not recollect the exact words used by the defendant, but that substantially it was he would not give up the goods until he was paid for saving them, or keeping them, or something to that effect.

This witness also testified that he did not offer to pay the defendant anything, and he did not know of any offer having been made by the plaintiff to pay him. Anderson made no other claim, and said the goods were not his.

The plaintiff here rested his case, and the defendant's counsel then moved for a nonsuit or for the complaint to be dismissed, upon the ground that the plaintiff's evidence showed that the case was an assignment of a tort; and also because the defendant had a lien on the goods for his trouble in storing them, and also on the ground that no demand and refusal to deliver up said goods had been shown. The judge denied the motion upon the ground (among others) that there was no lien set up in the answer, and the defendant excepted.

The defendant's counsel then called, as a witness on his behalf, Mr. Oly Anderson, the defendant in the suit, to the ad-

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mission of whose testimony the plaintiff's counsel objected, upon the ground of his being the defendant. His honor the judge overruled the objection, on the ground that plaintiff had introduced Mr. Uhlendorf, the person through whom the right to the property was claimed to come to plaintiff after it was found in defendant's possession, and the plaintiff excepted.

Mr. Oly Anderson, the defendant, was then sworn as a witness on his own behalf, and testified that he was a police officer of the city of New York; that the fire referred to by the witness Uhlendorf, took place in December, 1851; that the goods saved from the fire were in the first instance placed in the yard of his house; that he afterward took them up stairs, in his house—that they were partly wet and damaged, and he had them spread out and dried; that Mr. Uhlendorf came to his house the next day after the fire, and saw the goods, and requested that the goods might remain where they were until he could get a place, and that he agreed that they might remain; that afterward the insurance office people came and saw the goods, and told him not to deliver the goods to anybody till he heard from them. Afterward a Mr. Ahrens came and said the goods ought to be delivered to him because Uhlendorf & Fracks had bought them from him, and they had not yet been all paid for. He also testified that he had caused an advertisement to be inserted in the newspaper, in reference to these goods, which cost him four dollars. The New York Sun newspaper of the date of the 15th day of June, 1852, was then produced in court, and the witness pointed out the advertisement referred to; and the same was in the following words:

“The proper owners of the goods of the merchant tailor store, saved from the fire at No. 614 Water street, N. Y., on the 9th of December last, please call at 303 Front st., corner of Gouverneur slip, and pay charges and take the goods, or they will be sold at public auction in consequence of the same. *J. E. 15, 3, 165.*”

The witness further testified that he told the different parties that he wanted to find the true owner of the goods, and he thought he ought to be paid for the trouble he had had; but

he did not insist as a matter of right that anything should be paid. The witness further testified that when Mr. McGay called upon him about the goods, Mr. McGay asked him if he thought he had a lien on the goods; and that he replied to Mr. McGay that he thought he ought to be paid for his trouble in keeping and drying the goods.

He further testified that the goods remained at his house till June, 1852; and that the storage of the goods during that time was worth one dollar.

Upon cross-examination he testified that he had never before named any sum as being an estimate of what he thought himself entitled to; and in reply to a question put by a juror, as to what had become of the goods, he replied that they had been sold.

The defendant's counsel here rested his case. Whereupon the defendant's counsel requested the judge to charge the jury that no demand and refusal had been shown, and to direct a verdict for the defendant, but his honor the judge refused so to charge and direct; and the defendant's counsel then and there excepted, and his honor the judge charged the jury that if they believed the goods in question were the goods of Uhlendorf & Fracks at the time the fire occurred, and had been disposed of by them to the plaintiff, and if they believed that the plaintiff had subsequently thereto, and before the commencement of this action, demanded the goods from the defendant, and that he had refused to give them up, that the plaintiff was entitled to a verdict for the value of the goods, subject to the opinion of the court upon the questions of law that had arisen during the trial, and which would be disposed of by the court at the general term.

Neither plaintiff nor defendant excepted to the charge of the judge, nor any part thereof, and the jury, without leaving their seats, rendered a verdict for the plaintiff for \$150, subject to the opinion of the court, as aforesaid. The case was submitted by the counsel of the respective parties upon printed points.

J. McGay, for plaintiff.

I. The bill of sale of the goods in question to the plaintiff, given in evidence by the plaintiff, was not irrelevant, and was

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admissible to prove the ownership of the goods in the plaintiff; the defendant having, in his answer, denied the wrongful detention of the plaintiff's goods.

II. No tort was committed by the defendant until after the goods were sold to the plaintiff. Because the goods were lawfully in the possession of the defendant while they remained the property of Uhlendorf & Fracks, they never having demanded them. But, having been sold by them to the plaintiff, and he having demanded them, and they not having been surrendered to him—hence the tort. There was no tort to assign—because no tort had been committed when the bill of sale was executed; and the question, whether or not a tort is assignable, does not arise in this suit.

III. The motion to dismiss the complaint was properly denied; because, as a matter of fact, the evidence did not show this case to be the assignment of a tort, and because there had been a demand of the goods, and a refusal to deliver them, inasmuch as the defendant had refused, and, besides, the non-delivery was a refusal.

IV. The motion to dismiss was properly denied, also, because the defendant had not a lien on the goods, for saving them or drying them; because, 1. There is no evidence that the defendant saved the goods at all. "The goods were taken to the house of the defendant." The fact being that the goods were saved by the owners, and taken by them to the defendant's yard, and, 2. He was not requested to dry them, and "*non constat*," but the owners would rather have had them remain wet, and, 3. The law does not give a lien in such cases. The lien claimed by the defendant's counsel exists only in the case of goods saved from a ship on fire at sea, and goods thrown on shore from a wreck; and, besides, 4. The defendant himself not only did not claim a lien when he was asked for the goods, but, in his testimony, actually disavowed having one. "He did not insist, as a matter of right, that anything should be paid," and "he had never (before he gave his testimony) named any sum, as being an estimate of what he thought himself entitled to." 5. Of course, defendant had no lien for "keeping" or storing the goods, without an agreement to that effect; no agreement is claimed.

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V. The motion to dismiss was properly denied by the judge, upon the ground that even if the defendant had a lien, it should have been claimed in the answer.

VI. The judge properly refused to charge the jury, that no demand and refusal had been shown, and to direct a verdict for the defendant, because the evidence was the contrary.

W. Allen, for defendant.

I. The judge erred in refusing to nonsuit the plaintiff. 1. The action is trover (*Spalding v. Spalding*, 3 How. 297; *Dove v. Green*, 377 do., 1 Code Rep. 64). 2. The ground of such refusal as assigned, was matter of evidence and not of averment. The answer is a denial, which formerly would have been "not guilty," under which all matters were admissible in defence except "release" and "Statute of limitations." [See Chitty's Pl. title "Trover."] 3. No demand and refusal was shown. Charges for lien should have been tendered (20 Wend. 268; 2 Mason, 77, 80, 81).

II. The bill of sale was improperly admitted. Its effect was to show a case different from the complaint. The action claims damages, and is therefore for conversion of plaintiff's property. The bill of sale merely showed plaintiff to have a right of possession in property which had never been reduced either actually or constructively. The refusal to deliver up could only be an injury to such right of possession. The evidence was therefore irrelevant. It was also inadmissible, because it sustained no allegation of the complaint. Its highest effect was to show right of possession in plaintiff to property which came to defendant's possession as owned by Uhlendorf & Fracks. Defendant was their bailee. Any alleged change in ownership might be controverted by defendant. For these reasons an averment of the assignment was material. Not being so averred, evidence thereof was irrelevant, and a surprise upon defendant.

III. Such assignment furnished no link in the plaintiff's case. Being the assignee of a mere right to possession, his remedy was by "claim and delivery" in the detinet. His rights could not be the basis of such an action as this. The

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remedy he chose could be enforced only by the assignors. He is, therefore, before the court as the assignee of a tort. That he is such assignee is apparent from the fact that it is through the bill of sale alone that he has acquired rights.

IV. The judge should have charged that no demand and refusal had been shown. The verdict should be set aside with costs.

By THE COURT.—None of the objections to the plaintiff's recovery are tenable.

The answer denied property in the plaintiff, and as he had never been in the actual possession of the goods, he could only establish his title by proving a transfer from the former owner. The bill of sale was therefore properly admitted in evidence, although not set forth in the complaint. In an action of this nature, a general averment of ownership in the complaint is sufficient.

The goods, at the time of the sale, were, in judgment of law, in the possession of the defendant, as the agent or bailee of the former owners. Uhlenborn, one of the owners, had requested him to retain them for a time, and he had agreed to do so; the sale, therefore, to the plaintiff, being made by an instrument in writing, gave him an immediate and valid title, without a formal delivery of the possession. From the time of its execution, the possession of the defendant became that of the plaintiff.

As it does not appear that before the sale there had been any conversion of the goods by the defendant, or any denial by him of the title of the former owners, the sale was not a transfer of a mere right of action but of the goods themselves, and from that time the plaintiff was entitled, as owner, to demand their restoration.

A demand and refusal were sufficiently proved by the testimony of Mr. McGay, and as the question was submitted to the jury, were found by them in the verdict which they rendered for the plaintiff. Had not the proof been given, the admission of the defendant, that he had sold the goods, was sufficient to render him liable. As there was no proof that this sale was made after notice to the plaintiff of whose rights as owner he

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had full notice, it was plainly wrongful. Whether the defendant had a lien upon the goods for the price of their safe-keeping, it is unnecessary to consider, for, as we understand his testimony, he never demanded a compensation as a matter of right, and if he really meant to insist upon a lien, he was bound to make a positive claim, if not to state its nature and amount.

The plaintiff is entitled to judgment, with costs.

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In determining upon a demurrer, whether matters separately pleaded constitute a defence, the court will take into consideration all those parts of the answer which precede that which is covered by the demurrer.

The sufficiency of the defence may, in many cases, depend upon the fact, whether the allegations in the complaint have been admitted or denied.

As a general rule, it is a good defence to an action to recover the value of personal property, as unjustly detained, that it had been delivered to the true owner before the commencement of the suit.

Whether, when the defendant is a bailee, he can set up this defence against his bailor—Quere?

Demurrer overruled with costs.

(Before OAKLEY, CH. J., CAMPBELL and EMMET, J.J.)

June 23; July 2, 1853.

APPEAL from an order at Special Term, overruling a demurrer to a part of the defendant's answer. The following are the pleadings.

City and County of New York, ss.

HOMER P. BEACH, of said City, the plaintiff in the above entitled action, by John G. Vose, his attorney, complains of Robert H. Berdell, the said defendant, and shows to this honorable court, upon information and belief, that in or about the month of August, in the year 1851, at the city and county aforesaid, one Abner W. Spooner being the owner of a certain Texas

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Bond, (a true copy whereof is hereunto annexed, marked Schedule A, and which said plaintiff prays may be deemed part of this complaint,) by his agent or broker, at the special instance and request of the said defendant, deposited with him the said Texas bond for the purpose of enabling the said defendant to ascertain the value thereof, and that the said defendant then and there, in consideration that the said Abner W. Spooner would so deposit with him the said Texas bond as aforesaid, promised and agreed to and with the said Spooner, that upon the ascertaining the value thereof, he would either purchase the same from the said Spooner and pay him the value thereof, or would return the same to him upon demand.

And the said plaintiff, upon information and belief, further says, that the said Abner W. Spooner afterwards and in or about the same month of August, A. D. 1851, duly demanded from the said defendant the said bond or the value thereof; but the said defendant, though admitting that the said Texas bond was in his custody or under his control, utterly neglected and refused either to return the said bond or to pay the value thereof to the said Spooner.

And the said plaintiff further says, that by reason of the premises the said Abner W. Spooner has suffered damages to the amount of four thousand six hundred and forty-five ~~14~~ dollars.

And the said plaintiff further says, that afterwards and on or about the thirteenth day of May, in the year 1852, the said Abner W. Spooner for a good consideration paid to him therefor by the said plaintiff, by an instrument in writing under his hand and seal, duly executed and delivered, did sell, assign, transfer, and set over unto the said plaintiff the said Texas bond, together with all the right and rights of action of the said Spooner against the said defendant, or against any other person whomsoever, to recover the value of said bond or the possession thereof, with full power to sue for, collect and discharge, or sell and assign the same, as by reference to the said instrument of assignment when produced will more fully appear.

And the said plaintiff further says, that afterwards, and on or about the eighteenth day of May, 1852, he gave to the said defendant due notice of the aforesaid assignment, and demanded from the said defendant the said bond or the value thereof.

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But the said defendant, though admitting that the said bond was in his possession or under his control, utterly neglected and refused to deliver the same, or to pay the value thereof, to the plaintiff.

And the said plaintiff further says, that the value of the said bond, at the date of the commencement of this action, was the just and full sum of four thousand nine hundred and eighty $\frac{7}{8}$ dollars, to which amount the plaintiff has suffered damages by reason of the neglect and refusal of the said defendant to perform his said promise hereinbefore set forth. Wherefore the said plaintiff asks that his damages may be assessed at four thousand nine hundred and eighty $\frac{7}{8}$ dollars, for which amount, with lawful interest from the sixth day of July, in the year 1852, he demands judgment against the said defendant.

SCHEDULE A.

No. 144.

2nd Class.

Public Debt of the late Republic of Texas.

This is to certify that E. W. Moore, administrator of J. K. Lothrop (dec'd), has, under the provisions of an act of the Legislature of the State of Texas, entitled an act to provide for ascertaining the debt of the late Republic of Texas, approved 20th March, 1848, filed with the Auditor and Comptroller a claim for services as an officer in the Texan navy, amounting to three thousand seven hundred and sixty-six $\frac{7}{8}$ dollars, which is sufficiently authenticated to authorize the auditing of the same under the laws of the late Republic of Texas.

The said claim, according to the data before us, is worth three thousand seven hundred and sixty-six $\frac{7}{8}$ dollars, in par funds, as having been at that rate so available to the Government.

In testimony whereof, we have hereunto set our hands and affixed our seals of office, at Austin, this 11th day of April, 1849.

Signed,

[L. s.]
[L. s.]

J. B. SHAW, *Comptroller*.
J. M. SWIEHER, *Auditor*.

HOMER P. BEACH v. ROBERT H. BERDELL.—*Answer.* 1. The defendant, Robert H. Berdell, by Woodbury & Churchill his attorneys, answers the complaint in this action, and says that the said Texas bond in said complaint mentioned was deposited with him, the month of August, 1851, by one Montagnie, for certain purposes then agreed upon by and between the defendant and said Montagnie, and this defendant denies that the said bond was then the property of or owned by said Spooner, in said complaint mentioned, and that the same was deposited with the defendant by an agent or broker of said Spooner, and that any such promise or agreement was made by the defendant to and with said Spooner, as is stated and alleged in said complaint.

2. The defendant denies that said Spooner has sustained damages, by reason of the premises, to the amount stated in said complaint, or to any amount.

3. The defendant says that he has not sufficient knowledge or information to form a belief whether the said Spooner, on or about the 13th day of May, 1852, or at any time, executed to the plaintiff, as stated in the complaint, the instrument in writing or assignment therein mentioned, or any instrument in writing or assignment, and he denies that the said plaintiff, in the said month of May, or at any time, had any right, title or interest in or to the said Texas bond or the value thereof, and he denies that the value of the said bond, at the time of the commencement of this action, or at any time, was the sum of \$4,980.94, as stated in the complaint, and that said plaintiff has sustained damages to that amount, as alleged in the complaint, or to any amount.

4. The defendant denies that the plaintiff gave him due notice of said alleged assignment on or about the eighteenth day of May, 1852, or that he then demanded from the defendant the said bond or the value thereof, or that the said defendant then admitted that said bond was in his possession or under his control.

5. The defendant further answering says, that the said J. T. K. Lothrop, in said bond mentioned, was at the time of his death a citizen and a creditor of the Republic of Texas; that he

died in said Texas, in the month of ———, 1845; that the said Texas was then justly indebted to him in the sum in said bond mentioned; that afterwards, and in or about the month of May, 1845, the said E. W. Moore, in said bond mentioned, was duly appointed in the State of Texas administrator of the estate of said Lothrop, and that the State of Texas issued and delivered to said Moore, as such administrator, the said bond as the evidence of obligation for the debt so due from said Republic to said Lothrop; that the said Lothrop, at the time of his death, left him surviving a mother and two brothers and three sisters, and the children of a sister, then deceased, which said mother, brothers, sisters, and children, are still living, and also, by the laws of Texas, then were and still are the distributees of the personal estate of said Lothrop, and entitled thereto under the statute of distributions of said Texas. And this defendant further answers and says, that after the said bond was so issued and delivered to said Moore as aforesaid, and in or about the month of December, 1849, the same came into the possession of one James S. Holman, and that said Holman, as between himself and the said Spooner, in said complaint mentioned, and said plaintiff, and all other persons except the administrator and said distributees of said Lothrop, had, in the month of August, 1851, and at all times after the same came into his possession as aforesaid, the right and title to said bond; and that in said month of August, 1851, and at all times before and after, the same in fact belonged to, and was owned by and was the property of, the administrator and of said distributees of said Lothrop, the legal right and title thereto being in such administrator, and the beneficial interest, right, and title therein, after payment of the debts of said Lothrop, being in said distributees; and this defendant further answers, that while the said bond was so in his possession as aforesaid, and in or about the said month of August, 1851, he was advised and informed, by and in behalf of the said parties so owning and having right and title to said bond as aforesaid, of the facts above set forth as to the ownership thereof and the right and title thereto, and he was by them directed and requested not to deliver said bond to any person or persons, except the said parties so owning and having a right and title thereto as aforesaid, and he was by them

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required and directed to deliver the same to the said parties or their agents, and he did thereupon, and on or about the first day of September, 1851, accordingly deliver up said bond to and for the benefit of said parties so owning and so having right and title to the same; and he defends this suit at the request, and wholly for the benefit, and under the direction of the said parties so owning and so having right and title to the said bond as aforesaid.

6. And this defendant alleges and insists, that by his own showing in said complaint, the plaintiff is not entitled to maintain this action.

The defendants demurred to all that part of the answer contained in the fifth paragraph, on the ground that the matter alleged therein constituted no defence. The demurrer was overruled at Special Term with liberty to the plaintiff to reply, upon the usual terms.

From this order the plaintiff appealed.

L. B. Shephard, for the plaintiff, insisted that the demurrer was well taken, upon the following grounds.

I. The defendant having accepted the bond from plaintiff's assignor, upon a special contract that he would either purchase or return the same upon demand, cannot set up the right of Moore, Holman, and the distributees of Lothrop. 1. His undertaking to return is absolute, and such an undertaking is not answered by asserting the *jus tertii*. (Year Book, 9 Henry, 6 fo. 58, pl. 4; 1 Rolle Abr., p. 606; Southcote's Case, 4 Coke, 83 b; Story on Bailments, § 33; *Cogge v. Barnard*, 2 Ld. Raym. 909; 1 Smith's Leading Cases, p. 82; *Kettle v. Brumsale*, Willes, 118; *Steward v. Dunkin*, 2 Campbell, 344; *Miles v. Cuttle*, 6 Bingham, 747; *Gosling v. Birnie*, 7 Bingham, 339; Per Pollock, C. B., and Parke, B., in *Cheeseeman v. Exall*, 6 Welsb., Hurl. and Gord. 341, S. C. nom.; *Cheeseeman v. Exall*, 4 Eng. L. and Eq. R. 438; Digest, Lib. 50, tit. 17, c. 23; Pothier de Dépôt, Prelim. Art. and 2 Art. § 2, pl. 49, 50, 51; Dig. Lib. 16, tit. 3, c. 31, § 1.) 2. The cases in which the *jus tertii* have been allowed to be set up have been usually actions of trover.

In trover the plaintiff claims as owner, and the gist of the action is a conversion of his property by the defendant. It is, therefore, manifestly proper, in that action, for the defendant to show that the plaintiff was not owner, and that there was no conversion of his property. (*King v. Richards*, 6 Wharton, 418; *Schermerhorn v. Valkenburg*, 11 Johnson, 529; *Kennedy v. Strong*, 14 id. 128; *Rotan v. Fletcher*, 15 id. 407.) 3. The *jus tertii* has always been limited to cases where the depositor fraudulently obtained possession of the things deposited. See cases cited, *supra*, sub. 1.

II. Spooner had a right to assign his cause of action against the defendant. The action is upon the contract. But he had also a right to assign the bond so as to give the plaintiff, upon demand and upon refusal, a right of action against the defendant. (*Hall v. Robinson*, 2 Comst. 298; *Robinson v. Weeks*, 1 Code Rep., N. S. 311.)

C. P. Kirkland, for plaintiff.

I. The paragraph of the answer which is demurred to, shows that the bond in question is and always has been the property of third persons; and that the possession of it belonged to those persons when this suit was brought; that the suit is defended for their benefit and under their direction, the bond having previously been delivered to them by the defendant. And this paragraph is of course to be taken and construed in connexion with the preceding parts of the answer, denying that Spooner had any title to the bond, and denying any right to the plaintiff; the plaintiff cannot separate one part of the answer from another and demur. On the demurrer, the whole answer is to be resorted to; and here the answer sets up a perfect defence by denying that Spooner had any title, when he (as alleged) placed the bond in defendant's hands, and by showing who had the title; and why and how the defendant defends. 1. The bailee has a good defence against the bailor, if the bailor had not a valid title, and the bailee delivers the goods to the true owner. (2 Kent Com. 566, 567; 1 Greenl. Ev., § 207, note 1; Story on Bailms., § 552, 102, 34, 132; *Schermerhorn v. Van Valkenburg*, 11 John. 529; Story Ag., § 217, note

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a; 9 Bing. 382; 6 Whart. 418; 15 Johns. 207; 2 Greenl. Ev. § 648; 14 Johns. 132.) 2. Where bailor has not title, and the rightful holder demands possession of bailee, the bailee cannot interplead, but is to be deemed a tortious possessor, if he withhold the goods from the rightful owner. (Stor. Eq. Jur., § 819; *Taylor v. Plummer*, 3 M. & S. 562.) It would be a palpable perversion of justice and of right to hold that, under the facts stated in the answer and concealed by the demurrer, this plaintiff could recover.

II. The plaintiff, by his own showing, cannot maintain this action. He is the assignee of a tort; and a tort is not assignable. (Code, § 111; *Gardner v. Adams*, 12 Wend. 296.)

By THE COURT.—The order overruling the demurrer must be affirmed. In judging of the sufficiency of the defence which is set up in that part of the answer to which the demurrer relates, we are clearly of opinion that we have no right to reject from our consideration those parts of the answer which precede it. They must be read and construed in connexion. In determining the question, whether matters pleaded as a separate defence do or do not constitute a bar to the plaintiff's recovery, it must in many cases be a material consideration, whether the allegations in the complaint are admitted or denied, since upon the one supposition a defence may be plainly insufficient, which upon the other would be as certainly valid.

Here the first paragraph in the answer explicitly denies that the Texas bond, if bond it may be called, was deposited with the defendant by Spooner, or any agent of Spooner. It denies, therefore, that there was any such bailment as the complaint alleges. Hence, upon the pleadings as they stand, the question whether a bailee can set up the title of a third person in opposition to that of his bailor, does not at all arise, and consequently the whole argument in support of the demurrer falls to the ground. If there was no relation of bailor and bailee between Spooner and the defendant, the plaintiff can only recover upon the ground that he is the true owner of the bond in question, and to his claim as such the facts set forth in

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that part of the answer, which is covered by the demurrer, constitute a full defence.

It is not to be inferred from these remarks that had the defendant admitted that he received the bond as the bailee of Spooner, he could not, in our opinion, have interposed the defence which is now set up in his answer. The judges of this court who decided the case of *Bates v. Staunton*, 1 Duer S. C. R., p. 85, were disposed to think that in actions like the present, "the right of the true owner may be set up, in all cases where, upon his demand, the property has been in fact delivered to him before the commencement of the suit," and Chancellor Kent has clearly expressed the same opinion—2 Kent's Com., p. 567. It cannot, however, be said that the question is wholly free from doubt, and as we do not think it is properly before us, we shall leave it undecided.

Holding the answer to be good, it is not necessary to express any opinion upon the objections that were taken to the complaint.

Order overruling demurrer affirmed, with costs.

COHEN v. FROST and others.

The plaintiff, an emigrant German, was a steerage passenger in a ship owned by the defendants, on a voyage from Liverpool to New York, and during the voyage, his trunk containing wearing apparel, &c., was stolen and never recovered. *Held*, that as it appeared that the trunk was in the exclusive possession and custody of the plaintiff himself, and that he trusted to his own care and vigilance to protect him against its loss, the defendants as common carriers were not bound to indemnify him.

To render those who transport persons for hire responsible for the loss of baggage, it must be placed under their charge, and it is not so placed when the passenger retains possession and trusts to his own care for its safety.

Verdict for plaintiff set aside; verdict and judgment thereon entered for defendants.

(Before OAKLEY, Ch. J., CAMPBELL and ECKERT, J.J.)

June 24; July 2, 1853.

CASE on a verdict subject to the opinion of the court at General Term.

The action was against the defendants, as the owners of the ship *Princeton*, a ship employed in the carriage of passengers and freight between the ports of Liverpool and New York, and was brought to recover the value of a trunk and its contents, the property of the plaintiff, which it was alleged, through the negligence of the defendants, were stolen and lost on the passage of the ship from Liverpool to this port.

The answer denied that the trunk was in the possession or under the control of the defendants on the voyage, and that it was lost through their negligence or that of their servants; and alleged that by the usage of ships engaged in the transportation of emigrant passengers from Liverpool to New York, the passengers retain the exclusive possession and control of their personal baggage; that the plaintiff was a passenger of this class, and that the usage was well known to him when he was received on board, and that he acted in conformity to it.

The reply denied that the plaintiff had any knowledge of the alleged usage, or that he would have been bound by it, had its existence been known to him.

The cause was tried before the Chief Justice and a jury at the February trial term, 1853.

The following are the material facts proved on the trial: The plaintiff is a German emigrant, and took his passage as such in the steerage of the *Princeton*, on the voyage referred to in the pleadings; when he went on board he took his trunk with him into the steerage, and kept it for some time under his bed, and then tied it with ropes to the berth in which he slept. During the night of a violent storm, which occurred when the ship had been seven or eight days at sea, the ropes which fastened the trunk were cut, and it was carried off and stolen by some unknown persons and never recovered. The contents were proved to be of some value—wearing apparel and some gold and silver coins.

When the testimony on the part of the plaintiff was closed, the defendants' counsel stated, that he proposed showing that the transportation of passengers was a business prosecuted by various lines of vessels sailing between New York and Liver-

pool, and had been followed as a business for many years; and that the general custom and usage, by and among the masters and owners of such vessels in such business, and the emigrants, whom they carried, was, that all the luggage of such passengers continued to be under their own direction and control; and that the same was never taken into the possession or custody of the owners or masters of such vessel or their agent, and that the same was never delivered to nor accepted by them.

The plaintiff's counsel objected to the evidence of any such custom or usage. The court overruled the objection, and to its decision the plaintiff's counsel then and there duly excepted.

The usage alleged was fully proved by several witnesses; and that it had existed for many years past. There was no contradictory testimony.

The case was here rested on both sides.

It was then agreed by the respective counsel that the jury should pass upon the damages the plaintiff was entitled to recover, if entitled to recover at all.

The jury, after retiring under the charge of the court, rendered a verdict for the plaintiff for \$300 damages and costs; two hundred dollars thereof being for the wearing apparel of the plaintiff contained in the lost trunk, sixty-four dollars for money, and thirty-six dollars for the jewelry also contained in the trunk and lost with it.

By the consent of the respective counsel all questions of law as to the right of the plaintiff to recover were reserved for the future consideration of the court, at General Term, with liberty to the court to order a verdict and judgment to be entered for either party, as it might then determine.

D. Evans, for the plaintiff, now moved for judgment upon the verdict, and relied upon the following points and authorities.

I. By the common law, common carriers are insurers of the goods intrusted to and received by them in that capacity, and are liable for all losses except such as are occasioned by the act of God or public enemies. (*Coggs v. Bernard*, 2 L'd

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Raym., Rep. 909; 1 Smith's Leading Cases, 172; 2 Kent's Comm., 2d ed., 597; Story on Cont., § 752-769; *Hollister v. Nowlen*, 19 Wend. 234.)

II. Carriers of passengers, whether by land or water, are liable as common carriers in respect to the personal baggage of their passengers, of which they are insurers, the consideration for carrying the same being included in the fare or price paid for the conveyance of the passenger owner. (2 Kent's Com., 2d ed., pp. 601, 602; Story on Cont., §§ 751, 752, 755, 768; Story on Bailm., § 498; *Camden & Amboy R. R. Co. v. Burk*, 13 Wend. 611; *Hollister v. Nowlen*, 19 Wend. 234, and cases cited; *Cole v. Goodwin*, 19 do. 251; *Powell v. Meyers*, 26 do. 591; *Hawkins v. Hoffman*, 6 Hill, 586.)

III. There is no distinction in respect to liability between carriers by land and carriers by water. (Story on Cont., § 768, 769, 769 a, 769 b; Abbott on Shipping, 5th Am. ed., p. 288, and cases cited; 2 Kent's Comm., 2d ed., pp. 599, 600, and id. p. 608, and cases cited in note (c), and cases cited above under II.

IV. Besides wearing apparel, the term personal baggage may properly include a reasonable amount of money for the passenger's incidental expenses, and articles of personal convenience and comfort. (*Orange Co. Bank v. Brown*, 9 Wend. 85; and see *Hawkins v. Hoffman*, ubi supra; also, *Jones v. Vorhees*, 10 Ohio Rep. 145.) 1. If this last point should be denied to be law, in respect to land or inland carriers, the rule still holds in respect to carriers on the ocean, where the proper and usual place of deposit of pocket money of passengers is in their trunks or other baggage.

V. Even if the existence of the usage in respect to the baggage of emigrant passengers on board the vessels plying between New York and Liverpool, of which evidence was allowed to be given to the jury, should be considered as having been established on the trial, as a question of fact, such a usage, even if brought home to the knowledge of the plaintiff, would not discharge the defendants from their common law liability as common carriers. A general usage, the effect of which is to control the well settled rules of law, is inadmissible. (*Hone v. The Mutual Safety Co.*, 1 Sandford, S. C. R. 138; *Schooner*

Reeside, 2 Sumner R. 567; *Hollister v. Nowlen*, 19 Wend., page 247; *Cole v. Goodwin*, id. 251; Story on Cont., § 650; *Gould v. Hill*, 2 Hill, 623; *Wells v. The Steam Navigation Co.*, 2 Com. 204; *Price v. Powell*, 3 id. 322.)

VI. 1. Usage is only admissible for the purpose of determining the real intentions and understanding of the parties, where they are not otherwise determined, and are doubtful. (Story on Cont., § 649; Story, J., in *Schooner Reeside*, 2 Sumner, 567.) 2. But it is against the policy of the law that common carriers should be allowed to vary or limit their ordinary liability, or make contracts by implication in their own favor; and hence even direct notice given by them for the purpose of limiting their liability, is not allowed to prevail in this State. (*Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, id. 251; *Camden Transportation Co. v. Belknap*, 21 Wend. 354; *Gould v. Hill*, 2 Hill, 623; other cases and authorities, under 2.) 3. Besides, in the present case, the defendants failed to prove any notice to have been given by the defendants in reference to the baggage of the emigrant passengers, for the purpose of limiting their liability in respect thereto.

VII. 1. The leaving of the baggage, in a measure, under the control of the plaintiff, on board the ship, does not discharge or vary the liability of the defendants. It was placed in the part of the ship designated by the defendants, and over which they continued to exercise a supervision. (*Robinson v. Dunmore*, 2 Bosanq. & Pull. 416; 2 Kent's Com. 2 ed., p. 601; Story on Cont. § 768; *Hollister v. Nowlen*, ubi supra.) 2. The only limitation recognised to this rule applies to articles of baggage so small as to be conveniently carried about the person. (*Tower v. The Utica & Schenectady Railroad Co.* 7 Hill's Rep. 47.)

J. Cochrane, *contra*, insisted that judgment ought to be rendered for the defendants, upon the following grounds.

I. The plaintiff's trunk was gone—alleged to have been stolen. There is no evidence by whom it was taken; but whether stolen by a stranger or a sailor, in either case the defendants are not liable. (*Bull v. The Great Western R. R. Co.*, 7 Eng. Law and Equity R. 442.)

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II. The defendants were not liable for the trunk of the plaintiff as common carriers. They did not accept the custody of it. It was not at any time in their custody, but was in that of the plaintiff. To make a common carrier liable for baggage, he must have accepted it. (Angel on Carriers, §§ 140, 141, 322; Addison on Contracts, 809; *Miles v. Cuttle*, 6 Bing. 743; *East India Co. v. Pullen*, 2 Strange, 690; 2 Bos. and P. 419; *Tower v. Utica R. R. Co.*, 7 Hill, 47.) A general, known, and valid usage was proved, exempting defendants from all liability for baggage. This was the usual course of business. The basis of any liability of common carriers for baggage is a contract by them, implied from the usual course of business to carry it. (6 Hill, 589.) It is therefore competent to show what is the usual course of business. If that is not to receive baggage there can be no liability.

III. If the defendants are liable for baggage, they are not liable for the loss of the contents of plaintiff's trunk. He was an emigrant. All his worldly goods were packed in his trunk. It was his store-house and sub-treasury. It contained all his clothing, all his money, and all his jewellery. It contained more than enough for personal convenience on a journey. Such contents are not usually carried as baggage. (*Hawkins v. Hoffmann*, 6 Hill, 586, 589, 590.)

BY THE COURT. OAKLEY, CH. J.—We are all of opinion that, upon the evidence before us, the plaintiff cannot be permitted to recover. The ground of our decision is, that the trunk was never placed in the charge or custody of the defendants, as common carriers. It was in the exclusive possession and custody of the plaintiff himself, when the voyage commenced, and so remained at the time of the loss. He took it with him into the steerage, placed it under his bed, and fastened it with ropes to his berth; all his conduct in relation to it plainly showing that he relied upon his own care and vigilance to protect him against its loss. Whether the usage proved was binding upon the plaintiff, unless communicated and assented to by him, and whether the evidence justifies the presumption that it was in fact made known to him, are questions which we deem it unnecessary to consider, since, even supposing him to

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have been ignorant of the existence of the usage, we hold that he is concluded by his acts.

The case is not to be distinguished from that of a guest at an inn, who, when he takes his luggage to his own chamber, of which he keeps the key, discharges the innkeeper (*Burgess v. Clements*, 4 M. & Sel. 306; *Jervis v. Utica R. R. Co.* 607; 6 Hill, 47). The guest has his election, to trust for the safety of his property to the care and responsibility of the innkeeper, or to his own prudence. He cannot impute negligence to the innkeeper, when his conduct shows that he trusted himself. The innkeeper is not liable unless the property is placed in his charge. It is not so placed when the guest retains its exclusive possession and control, and we see no reason to doubt that these remarks equally apply to the relation between passengers and those who undertake to transport them for hire.

Mr. Justice Bronson, in the able opinion delivered by him, in the case of *Hawkins v. Hoffman* (6 Hill, 586), appears to have shown that the doctrine, that those who transport persons for hire, are responsible for the safe keeping and delivery of the baggage of passengers, is of modern origin, and rests not upon any positive rule of the common law, but upon a contract which has been implied from usage; and it seems a necessary consequence, that this implication may be repelled by evidence of an opposite usage. If so, the evidence of usage given upon the trial was properly received, and was of itself conclusive. It is not, however, upon this ground, but upon the reasons we have before given, that we place our judgment, which must have been the same had no usage been proved. The defendants, as carriers, never had charge of the plaintiff's trunk, and are not responsible for its loss.

The verdict for the plaintiff must be set aside, and a verdict and judgment thereon be entered for the defendants, with costs.

STEPHENSON v. NEW YORK AND HARLEM RAILROAD COMPANY.

An agent of a railroad company stated that the title of his office was superintendent, and that, as such, he had a general supervisory control over the whole line of the road, everything connected with the running of the road being

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under his supervision and control, and that he paid money to drivers, conductors, and other persons employed by him as superintendent, but had no direction over the treasury.

Held, that it was not to be inferred from this description of his powers that he was authorized by his office to arrange and liquidate claims made against the company, for the negligence of its servants in running its trains, or, as agent, to contract with third persons to repair or remedy the consequences of such negligence.

Held, therefore, that the superintendent of the road of the defendants, in the case before the court, had no authority to bind them by the employment of a physician or surgeon to attend upon a child, which had been run over by a car, and severely injured.

There being no other proof to charge the defendants—*Held*, that plaintiff was rightly nonsuited.

(Before Bosworth and Emmet, J.J.)

October 12; November 19, 1858.

APPEAL, by plaintiff, from a judgment dismissing the complaint.

The action was brought to recover the amount of a bill, alleged to be due from the defendants to the plaintiff, for services rendered by him at their request, as a physician and surgeon.

The complaint averred, that on the 9th day of June, 1849, the said defendants, in the city of New York, by their agent, Mr. Sloat, employed the plaintiff in his professional capacity as a surgeon and physician, to attend to one Peter Peteniat, a child, who had, on the said 9th day of June, 1849, received certain severe physical wounds and injuries, in consequence of having been run over, or in some other way injured by the horses, or by a certain car belonging to said defendants, and to amputate the leg of the said child, and otherwise to heal, cure, and restore the said child; whereupon this plaintiff, on the express engagement of the said Sloat, in behalf of the said defendants, that they would pay him for the same, did, in his said capacity of surgeon and physician, on the said 9th day of June, 1849, attend to said child, and amputate his leg; and did, from the said 9th day of June, 1849, to the 10th day of August, 1849, attend to said child, and endeavor to heal, cure, and restore him, and did find, provide for, and administer to said child divers medicines, remedies, and other necessary things in the healing and curing of said child; for which

attendance and cure of the said child, and the medicines, remedies and other necessities so provided by this plaintiff, at the request and on the behalf of the said defendants, the said defendants are justly indebted to this plaintiff in the sum of \$227.50, for which sum, with interest and costs, judgment was demanded.

The answer took issue on all the material allegations in the complaint, and denied, specially, that Sloat had any authority from the defendants to employ the plaintiff.

The action was tried before Mr. Justice Mason and a jury, on the 5th of February, 1851.

It was proved, on the part of the plaintiff, that the child mentioned in the complaint had been run over by a railroad car belonging to the defendants, and severely injured, in the month of June, 1849, and that the plaintiff, as a physician and surgeon, had attended the child, and performed the services stated in the complaint. One of the witnesses testified that Sloat, who represented himself to be an agent of the defendants, said, that "he wished the child to have a first-rate physician, and would see that it should all be right." Another, that Sloat told him (the witness) to "have the best medical attendance for the child, and that the company would be responsible for the payment;" and that Sloat made afterwards, through an interpreter, the same statement to the father of the child. A third witness swore substantially to the same facts, and that the father had employed the plaintiff. There was no proof that Sloat had made any direct communication to the plaintiff, or that the latter had any knowledge of the assurances which Sloat had given.

Sloat was then examined as a witness, on the part of the plaintiff, and testified as follows.

"I am one of the officers of the Harlem Railroad Company, and have been in the employ of the company as such, for nearly three years. The title of my office is superintendent. I have a general supervisory control over the whole line of the railroad, from New York to Dover Plains. The advertisements in the newspapers, with regard to the starting of the cars, their stoppage, times of arrival and departure, and general arrange-

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ments, are all signed by me, 'M. Sloat, Superintendent;' the large placards, giving these particulars, relative to the motive power, posted up in the cars, and at the station-houses along the road, are also signed in the same manner; everything connected with the running of the road is under my supervision and control. I wish to say that I have no direction over the treasury. I go up and down on the road, between the City Hall and Dover Plains, very often, in the discharge of my duties, as superintendent. I am on the track, in the discharge of my duties, more or less every day. My office is at the corner of 4th Avenue and 27th street. I do not go up and down the track at any stated times, but as my duties call me, sometimes a greater distance, sometimes a less. I have been in the habit of going up and down as superintendent, between here and Dover Plains, during the last three years. I suppose I am pretty well known along the line, as superintendent. I pay money to drivers, conductors, and other persons employed by me, for the company, connected with my business, as superintendent."

On being cross-examined, he said: "I have no share in the direction of the company's affairs."

The counsel for the plaintiff here rested, and the counsel for the defendants moved the court for a nonsuit, upon the following grounds.

I. That there was not sufficient evidence to go to the jury, that the superintendent, Sloat, was authorized by the defendants, as their agent, to employ the plaintiff for the services performed by him.

II. That there was not sufficient evidence to go to the jury, that the plaintiff had been employed by the said Sloat.

His honor the judge, thereupon ruled in favor of the grounds taken by the counsel for said defendants, and directed a nonsuit to be entered against the said plaintiff; to which ruling and decision, the counsel for the said plaintiff then and there excepted.

W. A. Butler, for plaintiff and appellant.

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It is insisted on the part of the appellant that the court erred in taking the case from the jury.

I. The question was not whether the agent and superintendent, Sloat, was authorized by the defendants to employ the plaintiff to perform the services rendered, but whether plaintiff had a right, under all the circumstances, to infer or suppose that he possessed such authority, judging from his own acts and those of his principals. (*Perkins v. Washington Ins. Co.*, 4 Cowen, 645, 660; *Lightbody v. N. A. Ins. Co.*, 23 Wendell, 18; *Johnson v. Jones*, 4 Barbour, 369.)

II. There was sufficient evidence to warrant the jury in finding that the superintendent, Sloat, was authorized on the part of the defendants to employ the plaintiff; such employment was within the scope of the authority of Sloat, as agent and superintendent.

III. Even if out of the scope of his ordinary duties or authority, the *emergency of the case* and the benefit resulting to the defendants from the employment, justified the act of Sloat in employing the plaintiff, and having been done in good faith, it is binding on the defendants. (Story on Agency, § 141.)

IV. There was sufficient evidence to warrant the jury in finding that the plaintiff was employed by Sloat. 1. The promise to pay for medical assistance, though not made directly to plaintiff, was clearly intended for his benefit, and contemplated the performance of the service by him. 2. The promise to pay such surgeon as might perform the service, is good, and enures to the benefit of him who performs it. (*Barker v. Bucklin*, 2 Denio, 45, 51, and cases there cited.) It is analogous to the offer of a reward, which has always been held to entitle the party who brings himself within the terms of the offer, to maintain an action. (*Williams v. Carwardine*, 5 C. & P. 566; S. C. 4 B. & A. 621; *Lancaster v. Walsh*, 4 M. & W. 16; *Loring v. Boston*, 7 Met. 411; *Wentworth v. Day*, 3 Met. 352; *Fallick v. Barber*, 1 M. & S. 108.)

V. A new trial should be granted, costs to abide the event.

C. W. Sandford, for defendants.

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I. The pleadings distinctly put in issue, the authority of the superintendent, Sloat, to employ a surgeon; but no evidence was given of any such authority.

II. The evidence showed that Sloat was employed *merely as superintendent of the motive power, or running of the railroad*. That he had nothing to do with its finances, and no share in the direction of the company's affairs.

III. Acts of agents beyond their powers, are not binding on a corporation or individuals. (*Munn v. Commission Company*, 15 Johnson, 44; *Angel & Ames on Corp.* 172, 3, 4; *Beals v. Allen*, 18 Johnson, 363; *Hartford Bank v. Hart*, 3 Day, 493; *Dispatch Line v. Bellamy Manuf. Co.*, 12 New Hampshire, 205; *Ready v. Tuscaloosa*, 6 Alabama, 327; *Martin v. Manuf. Co.*, 9 New Hampshire, 51; *Farmers' Bank v. McKee*, 2 Barr, 318; *Boom v. City of Utica*, 2 Barbour S. C. R. 104; *Mann v. Currie*, id. 294; *Johnson v. Bush*, 3 Barbour's Ch'y Reports, 207; *Brown v. Appleby*, 1 Sandford's Sup. Ct. 158; *Hone v. Allen*, 1 id. 171, Note.)

IV. The nonsuit was properly entered.

BY THE COURT. BOSWORTH, J.—At the conclusion of the testimony a nonsuit was moved on two grounds. The case states, the judge "ruled in favor of the grounds taken by the counsel for said defendants, and directed a nonsuit to be entered against the plaintiff, to which ruling and decision the counsel for the plaintiff then and there excepted."

If either ground was sufficient to justify the nonsuit, the judgment must be affirmed.

A nonsuit was moved on the ground, 1st—"That there was not sufficient evidence to go to the jury, that the superintendent, Sloat, was authorized by the defendants, as their agent, to employ the plaintiff for the services performed by him."

The answer denies that the defendants ever did, at any time, authorize the said Sloat to employ any person or persons, as physician, or otherwise, to render services to said Peter Peteniat, as alleged in said complaint.

The title of the office held by Sloat is "Superintendent." The only evidence of the nature and extent of his powers is

such as the title of his office implies, and that furnished by his own testimony. There is no evidence that he ever made any other contract of a like character.

He testified that everything connected "with the running of the road" was under his supervision and control. That he had no direction over the treasury, and had no share in the direction of the company's affairs. He pays money to drivers, conductors, and other persons employed by him for the company, connected with his business as superintendent.

The only inference deducible from his description of his powers is, that they relate solely to making provision that trains are run as prescribed by the company, that means and men are supplied for the purpose, and other things are provided, which are essential or proper to effectuate this general result. His description of his powers, or of the business which he transacts, does not justify the inference that he is authorized, by his office, to arrange and liquidate claims made against the company for the negligence of its servants in running its trains, or to contract with third persons, as its agent, to repair or remedy the consequences of such negligence.

There is nothing in the evidence to justify the application of the principle that whether authorized or not, yet the plaintiff had a right to infer and act on the inference, that judged by his own acts *and those of his principal*, he possessed such authority.

This case differs, in its essential facts, from that of *Perkins v. Washington Ins. Co.*, 4 Cowen, 645. In this case, there is no evidence that the superintendent was ever authorized to employ, as agent of the company, in any event, or upon any contingency, a physician to attend upon persons injured by the running of the company's cars, or that they ever ratified, or knew of any such contract made by him.

In *Perkins v. The Washington Ins. Co.*, Russell, who advertised himself as the agent of the company for the city of Savannah, was authorized to agree to make insurances, to receive and remit the premiums, and if the company actually received the money, and the rates charged were such as they had prescribed, and the terms of the agreement corresponded with their regulations, they agreed to furnish a policy which should be operative from the time of the payment of the premium to

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Russell. Prior to the transaction between himself and Perkins, he had agreed to insure for a number of individuals, had received the premiums and transmitted them to the defendants, and in every instance except one, the company had issued policies bearing date at the time the receipt was given by Russell for the insurance. Perkins had paid to Russell the highest rate of insurance, had tendered the amount to the company, and there was no ground on which they could exempt themselves from giving a policy, except the arbitrary one, that they did not choose to do so.

In *Lightbody v. The North American Insurance Company*, 23 Wend. 18, *Hayner* was expressly authorized to insure. He was furnished with blank policies executed by the officers of the company, ready to be delivered to any one who might wish to contract, after his name, the subject insured, the extent of the risk, and the date of the transaction, had been inserted in the contract. As to all persons, ignorant that his appointment restricted him in the exercise of his agency to a specific locality, he was a general agent, with unlimited authority. The plaintiff had no notice that he was restricted in the exercise of his powers to a defined territory.

In the case at bar, there is no evidence that Sloat was ever authorized to make, on any contingency, such a contract as the plaintiff alleges was made with him, or that, with the exception of this instance, he ever made such a contract, or represented himself authorized to make one of such a character.

It is urged that the emergency of the case and the benefit resulting to the defendants from the employment, justified the act of Sloan in employing the plaintiff, and that having been done in good faith it is binding on the defendants.

We cannot assent to this proposition. No emergency arose, which but for this employment would have interrupted or prevented the running of defendants' cars. If the injury was not caused by the negligence of its servants, contracting to pay for expenses to which they could not be subjected by law, would be no benefit to the company. If caused by such negligence this employment would not exonerate them from any liability, which would otherwise have attached. The principle sought to be invoked has no application to the facts of this case.

Fairbanks v. Bloomfield.

We are of the opinion, that the nonsuit was properly granted on the first ground on which it was moved, and that the judgment appealed from should be affirmed.

FAIRBANKS and others v. BLOOMFIELD and another.

Whether an instrument in writing is or is not a valid mortgage is a question of law, and to enable the court to determine it when the action is founded upon the writing, either the whole instrument, or those provisions which are relied on as giving to it the character of a mortgage, must be set forth in the complaint.

When the complaint averred that the defendants had seized and taken possession of a vessel, the value of which was sought to be recovered under an attachment issued under the laws of Connecticut, and did not show nor aver that the attachment was void ;

Held, that the refusal of the defendants to deliver the possession was justifiable upon the face of the complaint. Judgment for defendant upon demurrer to the complaint.

(Before DUNE & BOSWORTH, J.J.)

October 18. November 19, 1853.

APPEAL from an order at special term, overruling a demurrer to the complaint.

The complaint is in the words that follow.

The plaintiffs in this case complain against the defendants, and allege that they, the said plaintiffs, are co-partners, doing business under the firm of Fairbanks & Allison, in the city of Halifax, in the province of Nova Scotia. That one Gilmore Densmore M'Lellen, being the owner of a certain vessel or brigantine, called the Bloomfield, and being indebted to the said plaintiffs in the sum of eight hundred pounds, Nova Scotia currency, did, on the twenty-third day of May, A.D. one thousand eight hundred and forty-eight, execute to the said plaintiffs a mortgage for the said sum of eight hundred pounds, Nova Scotia currency, upon the said brigantine Bloomfield ;

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that under and by virtue of the said mortgage, the said plaintiffs became entitled to the possession of the said brigantine Bloomfield on the twenty-third day of August, one thousand eight hundred and forty-eight, as by the said mortgage ready to be produced, as this court shall direct, will more fully appear.

And the said plaintiffs allege that at the time they became entitled to the possession of the said brigantine aforesaid, the same had been seized and taken possession of, under process of attachment, issued at the suit of the said defendants, on the 25th day of July, one thousand eight hundred and forty-eight, under the laws of the State of Connecticut, at the suit of the said defendants against the said John Gilmore Densmore M'Lellen, and were then in the custody of John Stevenson, a constable of the town of Bridgeport, in the county of Fairfield, and state of Connecticut. That the said vessel was so seized and taken possession of by the direction and at the instance of the said defendants.

And the said plaintiffs further allege that after they became entitled to the possession of the said vessel as aforesaid, they made a demand for the same of the said defendants; that the said defendants refused to deliver or authorize the said constable to deliver the said vessel to the said plaintiffs.

Whereby the said plaintiffs allege that the said defendants unlawfully converted the said vessel to their own use, and they therefore claim that the said defendants are indebted to them, the said plaintiffs, in the sum of three thousand two hundred dollars, being the amount due to them upon the mortgage aforesaid; and also in the sum of one thousand dollars, being the damage they have suffered from the loss of the possession of the said vessel; and they pray judgment accordingly.

The demurrer was general, on the ground that the complaint did not state facts sufficient to constitute a cause of action.

H. B. Cowles, for defendants.

The demurrer is well taken, because

I. The complaint does not state facts sufficient to constitute a cause of action. 1. It does not show that the plaintiffs had any

valid title to, or property in the vessel in question. 2. It does not show the terms of the contract or agreement which is called a mortgage of the vessel. Whether the contract constitutes a mortgage or not is a question of law, to be pronounced by the court upon the facts. 3. It does not show when the moneys claimed under the contract were due or payable, or that by its terms the plaintiffs were entitled to the possession of the vessel, or that there had been a default in payment. 4. It does not show where the contract or agreement called a mortgage was made, or executed, or where it was to be performed. Nor that it was valid where made, or to be performed, or gave the plaintiffs any right to the possession of the vessel under it. Its construction may depend upon the *lex loci contractus*. 5. The complaint does show, that possession of the vessel was not taken by the plaintiffs when the so-called mortgage was executed, and that they did not claim to be entitled to the possession of it until long afterwards. 6. No fact or reason is stated in regard to the possession upon which the court can pronounce the so-called mortgage valid, or that the plaintiffs thereby acquired title to the vessel. 7. It appears by the complaint that before the plaintiffs claimed to be entitled to the possession of the vessel by virtue of the so-called mortgage, she had been seized and taken possession of by process of attachment, issued under the laws of Connecticut, at the suit of the defendants, against M'Leland, and was then in custody of a constable, &c. Under these circumstances, the plaintiffs had no right or title to the vessel at all, and the attachment would hold her. (*Swift v. Thompson*, 9 Conn. Rep. 63 ; *ib.* 216.) She was in the custody of the law under process issued under the laws of a sister state, and no action will lie against the defendants on the grounds alleged in the complaint. (*Jenner v. Joliffe*, 6 John. Rep. 3 ; 9 *ib.* 381.) The equity of redemption at least might be properly taken on the attachment, at the time the vessel was taken, and she might be sold subject to the so-called mortgage of the plaintiffs. The defendants were not bound to deliver her to the plaintiffs, the more especially as it does not appear that there was any evidence of title exhibited by the plaintiffs to the defendants, or any ground of right or claim stated to them. 8. The complaint does not show that after the attachment

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was so issued, the plaintiff had power to supersede it, or order the vessel delivered to the plaintiffs. Or that the plaintiffs paid or offered to pay the costs incurred upon the seizure upon the attachment. The remedy of the plaintiffs, if they have any, is by replevin against the officers. 9. The complaint does not state the time or place when and where the alleged demand was made. 10. It does not show facts upon which an unlawful conversion can be predicated or adjudged. 11. The complaint attempts to make the plaintiffs' conclusions of law and fact supersede the necessity of stating the facts constituting their cause of action.

R. S. Emmet, for plaintiffs.

I. The complaint is sufficient in form and substance. It shows a special property, with a right of possession of the brig Bloomfield in the plaintiff, and a tortious conversion by the defendants before suit brought.

II. The possession of the defendants, and the officer under the attachment against the mortgagor, were subordinate to the plaintiffs' right to take possession under his mortgage, when it became due. 1. A mortgagee, with right of possession, may maintain trover for the conversion of a chattel. (*Slack v. Littlefield*, Harper, 298; *Gordon v. Harper*, 7 Term 9; *Matteson v. Barcus*, 1 Comst. 295; *Reynolds v. Shuler*, 5 Cow. 323; *Stuart v. Taylor*, 7 How. Prac. R. 251; *Fenn v. Battleson*, 8 Eng. L. & E. R. 483.) 2. The possession of the officer under the direction of the defendants, was equivalent to possession by themselves, as regards these plaintiffs. (*Libby v. Soule*, 1 Shep. 310; *Jenner v. Joliffe*, 6 John. 9.) 3. A mortgagee may maintain trover for a conversion of a chattel by a stranger, whilst it was in the possession of the mortgagor. (*Snyder v. Hilt*, 2 Dana, 204.)

III. Even if the original taking had been lawful (which we do not admit) that would not justify the defendants' wrongful conversion by refusing possession to the plaintiff on demand. (*Murray v. Burling*, 10 John. 172.)

IV. Whether there are circumstances to justify the refusal, or whether the person making the demand had authority to do so,

are questions of fact for a jury. (*Dent v. Childs*, 5 Stewart & Portm. 383.)

V. It was not necessary to set forth the mortgage at length, nor the place of execution. The defendants might have procured an inspection of the mortgage by application to the court, under section 380 of Code, or might have compelled the plaintiff to make the complaint more definite and certain, under section 160 of Code.

The order of the Special Term, overruling the demurrer, should be affirmed.

BY THE COURT. DUEB, J.—The demurrer to the complaint, we think, is well taken.

Whether the instrument, by virtue of which the plaintiffs aver that they became entitled to the possession of the vessel, is or is not a mortgage, is plainly a question of law, which it belongs to the court to determine; and to enable the court to determine it, the complaint ought to have set forth, if not the whole instrument, at least those provisions which are relied on as giving to it the character of a mortgage; in other words, of an instrument vesting in the plaintiffs a legal right to the possession which they claimed. In calling the instrument a mortgage, the plaintiffs substitute their own opinion, or that of their counsel, for the judgment of the court. The safest course, under the Code, where the action is founded on an instrument in writing, is to annex a copy and refer to it as a part of the complaint.

The next objection is perhaps still more evidently fatal. The complaint admits that before the plaintiffs became entitled to the possession, the vessel had been seized and taken possession of under an attachment issued at the suit of the defendants under the laws of Connecticut, but does not show, nor even aver, that the attachment was irregular and void, either absolutely or as against the plaintiff; and, if not, the defendants were entirely justified in their refusal to comply with the demand of the plaintiffs that they would deliver to them the possession of the vessel, or authorize its delivery by the constable. Nor does it appear that they could have given any order to the constable which he would have been bound to obey. *Prima facie*, an

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order of the court from which the attachment issued was necessary to discharge it, and until it was discharged, it was the duty of the officer to retain the possession, which it doubtless enjoined him to keep.

It is true that the complaint concludes by averring that the defendants unlawfully converted the vessel to their own use, but as the averment is not warranted by the facts that precede it, it is wholly immaterial.

The complaint has throughout the usual defects of substituting conclusions of law for the facts, which ought to be so clearly and fully stated as to enable the court to draw the proper conclusions—that is, to say whether they do, or do not, constitute a cause of action.

The order overruling the demurrer is reversed and the defendants are entitled to judgment, but the usual liberty to amend, upon payment of costs, is given to the plaintiffs.

WESTERVELT and another v. LEVY.

In an action against the owner of a building in the city of New York, to recover a balance, alleged to be due from him upon the contract for the erection of the building, the defendant cannot set up as a bar to a recovery, that mechanics and other persons had taken the necessary preliminary steps for establishing liens upon the building, for labor performed, or materials furnished by them, at the request of the contractor.

The defendant, in such a case, should seek relief, either by instituting a cross-action, making all the persons claiming liens parties thereto; or by a special application for liberty to pay into court the amount due from him upon the contract, to abide a final decision upon the claims, and for a stay of proceedings in the meantime.

The mere pending of claims under the lien law, which have not been satisfied nor even established, can be no defence to an action for the recovery of the sum he had expressly covenanted to pay. Judgment for plaintiff affirmed with costs.

(Before DUEB, BOSWORTH, & EMMET, J.J.)

October 20. November 19 1852.

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APPEAL by defendant from a judgment at special term upon the report of a referee, in favor of the plaintiff, for \$4627.70, including costs.

The action was brought to recover a balance, alleged to be due from the defendant upon a contract between him and one Purss, for the erection of a building upon lot 49 Maiden Lane, in the city of New York. The plaintiff claimed as the assignee of Purss.

The principal defence set up in the answer, and that to which the questions before the court alone related, was, that certain mechanics and other persons, who, at the request of Purss, had performed labor, and furnished materials for the building, had acquired liens thereon, pursuant to and in the manner required by the 6th section of the Act, "For the better security of mechanics and others, erecting buildings and furnishing materials therefor, in the city and county of New York," passed July 11, 1851. That the liens so created had not been discharged, nor in any manner brought to a close, and amounted to the sum of \$8,247.96, which sum the defendant claimed to set off against the demand of the plaintiff.

The referee, W. Inglis, Esq., made a special report—that part of it, which relates to the above defence, is as follows.

And I do further report, that I find that Horace Beals, surviving partner, &c., on the eleventh day of September, one thousand eight hundred and fifty-one, served a notice in writing upon the clerk of the city and county of New York, specifying that, under an agreement with the said Joseph D. Purss, he had furnished materials and performed labor towards the erection of the said building, number 49 Maiden Lane, to the amount of \$561.97; that on the twenty-third day of September, in the same year, Charles H. O'Hara served a notice on the said clerk, specifying that, under an agreement with the said Purss, he had furnished materials and performed labor towards the erection of the said building to the amount of \$704.05; that on the third day of October, in the same year, William Joyce served a notice on the said clerk, that, under an agree-

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ment with the said Purss, he had furnished materials towards the erection of the said building to the amount of \$545; that on the fourth day of October, one thousand eight hundred and fifty-one, George J. Lorton served a notice on the said clerk, that, under an agreement with the said Purss, he had furnished towards the erection of the said building, materials to the amount of \$250; that on the sixth day of October, in the same year, L. W. Halsey served a notice on the said clerk, that, under an agreement with the said Purss, he had furnished materials and performed labor towards the erection of the said building, to the amount of \$700; that, on the nineteenth day of November, one thousand eight hundred and fifty-one, Westervelt & Bogart served upon the said clerk a notice, that, under an agreement with the said Purss, they had furnished materials to the erection of the said building to the amount of \$2,924.27; that on the eighth day of January, one thousand eight hundred and fifty-two, William A. Sinclair served a notice on the said clerk, that, under an agreement with the said Purss, he had furnished materials to the erection of the said building on the lot number 49 Maiden Lane, to the amount of \$25.48; that on the thirteenth day of February, in the year last mentioned, Levin N. Cowley served upon the clerk of the city and county of New York a notice that, under an agreement with the said Purss, he had furnished building materials to the erection of the said building to the amount of \$130. That the said Levin N. Cowley, on the seventeenth day of February last aforesaid, served upon the said clerk a notice, that, under an agreement with the said Purss, he had furnished materials to the erection of the said building to the amount of \$130; that on the eighteenth day of the same month and year last aforesaid, certain persons doing business under the name and firm of S. B. Althouse & Co., served upon the said clerk a notice, that, under an agreement with the said Purss, they had furnished materials to the erection of the said building, to the amount of \$2,277.19. That such notices specified the amounts of the respective claims of the said persons, for such labor performed and materials furnished in and upon the said building, and the name of the person against whom the said claims were made, the name of the owner of the building, and

the situation of the building by its street and number, and that the said clerk entered the particulars of the said notices in a book kept in his office, called the "lien docket," pursuant and in the manner required by the 6th section of an act of the legislature of the State of New York, entitled, "An Act for the better securing of mechanics and others erecting buildings, and furnishing materials therefor, in the city and county of New York," passed July 11th, 1851; and that the persons, excepting the said William A. Sinclair, who have given such notices to the said clerk of the city and county of New York, pursuant to and in the manner required by the 6th section of the said act, respectively caused notices to be served personally on the defendant in this action, requiring him to appear in the Court of Common Pleas for the city and county of New York, at certain times specified in the said notices, none of which times were less than twenty days from the time of such services, and submit to an accounting and settlement in the said court of the amount claimed to be due for the matters aforesaid; that bills of particulars of the amount of each and every of the said claims, except that of the said William A. Sinclair, were also served on the said defendant within fifteen days after service of the said last mentioned notices, and that the said notices that were served on the said clerk and on the said defendant were served before the commencement of this action.

And I do further report, that I find that the serving of the said notices effected a lien, in each and every of the cases above stated, upon the lot number 49 Maiden Lane, in the city of New York, and the building on it, for the value of the labor and materials in the respective cases above mentioned, upon the lot of the defendant, number 49 Maiden Lane, in the city of New York, and the building thereon, to the extent of the right, title, and interest existing at the times of filing the said notices with the said clerk, or the said defendant therein; that the said liens were imposed and held to secure the payment of the sums of money, claimed to be due from the aforesaid Joseph D. Purss to the aforesaid persons who gave such notices as aforesaid.

And I do further report, that, in allowing the sum hereinafter reported to be due to the plaintiffs, any claim under the liens

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above mentioned, has not been considered, and that no deduction has been made therefor.

And I do further report, that I find that the defendant is entitled to an allowance of one hundred and forty-seven dollars and sixty-six cents, by way of recoupment or counter-claim, which sum I have deducted from the amount hereinafter reported to be due to the plaintiff.

And I do further report, that I find that there is due and owing to the said plaintiffs from the said defendant, at the date of this report, the sum of four thousand five hundred and thirty-one dollars and eighty-one cents.

March 31st, 1853.

WILLIAM INGLIS.

C. Haring, for the defendant, moved for the reversal of the judgment, and argued as follows.

I. The plaintiffs, as assignees of Purss (the contractor), take subject to all equitable as well as legal defences which can be urged against the assignor (*Graves v. Woodbury*, 4 Hill, 561 ; 1 Cowen, 56, 206).

II. The plaintiffs, as assignees, &c., were not entitled to demand the notes, or the payment of the \$4,400, alleged to be due, until the architect's certificate was obtained, 2d March, 1852 ; previous to which time, between the 11th September, 1851, and 18th February, 1852, liens were perfected under the act of 11th July, 1851, amounting to \$8,247.96, for work and materials furnished by sub-contractors, under agreements with Purss, the contractor, for the building of the defendant, 49 Maiden Lane. The rights of the plaintiffs were, therefore, subject to those liens ; and the liens being for a far greater amount than the claim of the plaintiffs, no judgment can be rendered for the plaintiffs until those liens are discharged.

III. The effect of the law for the better security of mechanics, &c., in the city of New York, passed July 11th, 1851, is to substitute the sub-contractor in place of the contractor, to the extent of the amount due the sub-contractor, and to render the owner absolutely liable to him for such amount. See case of *Sullivan v. Brewster & Gale*, N. Y. Common Pleas, General Term, May, 1853 (8 How. Pr. Rep. 209), where held, that

"The operation of the lien law is to transfer to the sub-contractor, so much of the contractor's claim against the owner as would be sufficient to pay the debt of the contractor to his sub-contractor." Under the above decision, the whole amount due by the defendants is transferred to the lien holder. In *Lehretter v. Koffman* (Com. Pleas, January, 1852), a suit was brought by an owner, to obtain injunction restraining a lien holder from enforcing his lien, on the ground that prior liens would absorb the whole amount due, held, "If there are prior liens sufficient to absorb the funds remaining in the hands of the owner, it is a good defence to a suit on a subsequent lien."

IV. The report of the referee shows that a valid lien was effected upon the building of the defendant, for work done, under an agreement with Purss. The holders of those liens are to be paid their claims at all events, the law having been passed for the especial protection of sub-contractors; should the judgment, in favor of the plaintiff, be allowed to stand, the defendant will be compelled to pay at least double the amount due by him. The owner cannot be compelled to pay on account of the building, any greater sum than the price stipulated to be paid by the contract between himself and the contractor (*Doughty v. Devlin*, General Term, Com. Pleas).

V. The referee states, that in allowing the sum reported in favor of the plaintiff, any claims under the liens mentioned have not been considered. It is submitted that he has erred in his decision. 1. In omitting to consider the defence interposed by the defendant, founded on the liens, and state his conclusion of law thereon. 2. In reporting in favor of the plaintiff the sum of \$4,531.81 for erection of the building, 49 Maiden Lane, while there were valid and subsisting liens against said building, for work and materials furnished, under agreements with the contractor, to the amount of \$8,247.96.

VI. The judgment entered in favor of the plaintiff should be reversed, or all proceedings under it suspended, until the liens on said building are discharged.

E. Sandford, for plaintiff.

BY THE COURT. BOSWORTH, J.—The facts found by the

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referee, in relation to the service of notices in writing, upon the Clerk of the City and County of New York, by Horace Beals, Charles H. O'Hara, William Joyce, and others, and the entry by the clerk of the particulars of such notices in the "Lien Docket," in relation to the service of notices upon the defendant, requiring him to appear in the Common Pleas, and submit to an accounting; and in relation to the service on the defendant of bills of the particulars of each of said claims, created a lien on the defendant's lot and building, in favor of each claimant, for such sum as it might be adjudged was due to him on such claim. The referee does not find, that either claimant had performed the labor or furnished the materials specified in his notice, or that anything was owing to either on account of such claim.

The question is, what is the effect of serving papers and taking proceedings proper in form to create a lien for securing the payment of a claim, the existence of which is not established, but which may or may not be established. Does it absolutely bar an action in favor of the original contractor? If so, on what principle? The referee has not found that these claims are valid, or what, if anything, is due upon them. For aught that appears, the whole amount, or no part of the amount of them, or of any one of them, may be adjudged to be owing to the claimant.

Unless something is due on them, the plaintiffs should recover the balance owing by the defendant. If something, but less than the amount of such balance is due on them, they are entitled to the difference, at all events.

We do not see any objection, in a case like the present, to the defendant's bringing a cross action and making all the claimants parties, so as to conclude them as to the amount owing by the defendant on his contract, by the judgment in this action, and to obtaining a judgment enjoining the collection of that amount by the plaintiffs, until the decision upon the claims, and directing the payment of the amount, or so much of it as might be necessary to satisfy the claims as they should be established, and according to the rights of the claimants, and the surplus, if any, to the plaintiffs.

Neither is it perceived, that any successful resistance could

have been made, to an application by the defendant, after the amount of his liability had been determined by the referee, for leave to pay the amount into court, to abide the decision upon the claims made, and for a stay of all further proceedings in this action in the mean time.

It is entirely obvious, that there are adequate remedies by which the defendant can shield himself against the hazard of being compelled to pay the same debt twice. It is also very clear, that the fact of a claim having been made against him, which would, if established and satisfied, be a bar to the action, is no bar until it is established, even if it would be before satisfaction.

Would the recovery of a judgment against him, by the claimants, without satisfaction of it, extinguish all liability on his part to the plaintiffs? Would the recovery of a judgment against him by the claimants, without satisfaction of it, preclude them from recovering the amount due them, from the original contractor, who employed them to do the work, and furnish the materials, for which such judgment was rendered?

If the defendant is discharged from all liability to the plaintiffs, by the effect and force of the recovery of a judgment against him, without payment of it, then such recovery without payment ought to have the effect of discharging the original contractor from all liability to such claimants.

It is difficult to find anything in this act to justify the conclusion, that the creation of a lien upon the lot of the owner, and the recovery of a judgment against him, by the mechanics, for the amount owing to them, in effect, and in judgment of law, extinguishes the liability of the original contractor to them, for the services rendered or materials furnished on his employment, and promise to pay for them, irrespective of the question whether anything is, or can be realized, on such judgment. The creation of a lien and establishment of a claim by a judgment against the owner, secures to the claimant the responsibility of the owner, the security which the extent of his interest in the building and lot at the time of creating the lien may furnish, and, perhaps, the further remedy of an execution on the judgment, against his other property real and personal (§§ 7 and 8, Laws of 1851, p. 955.)

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But does it extinguish the liability of the original contractor to the claimant? Is it anything more than a statutory security for the satisfaction of such liability?

If it does not extinguish such liability, then, on what principle can a recovery by the claimant against the owner, without payment, extinguish the owner's liability to the original contractor?

Whatever may be the proper answer to these questions, we are clear in the opinion, that the facts found by the referee do not constitute a bar to the action. It necessarily follows that the judgment appealed from must be affirmed, and the defendant must resort to other proceedings to stay the enforcing of the judgment by the plaintiffs, until the determination of the claims mentioned in the referee's report.

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The mere fact that a judgment confessed, is confessed to secure as well a debt owing to a creditor other than the plaintiff, as one owing the latter, does not render it fraudulent and void as against creditors.

A sheriff holding several executions against the same debtor, received at different times, cannot be required to treat those first received as dormant, merely because the plaintiffs therein gave to the sheriff a written consent that he might adjourn a sale under them, for forty-seven days after their return day, there being no agreement giving to the debtor a delay, or the use or benefit of the property in the meantime.

A plaintiff, in a junior execution, cannot sustain an action for falsely returning it, *nulla bona*, by merely proving that a judgment on which an older execution issued was confessed with intent to defraud creditors, that the sheriff was so notified, and was also notified that the proceeds of the property would be claimed on the junior execution.

The sheriff is not bound to try the question of fraud, nor to decide at his peril which of the two creditors should have the preference, so long as he acts indifferently between the parties, and does not lend himself to either. If a sheriff has notice of incontrovertible facts, which would render it fraudulent, he is bound to treat it as fraudulent.

The sheriff cannot defend an action for falsely returning *nulla bona*, by proof of a prior execution falsely returned, *nulla bona*. He can justify, under a prior execution, only by showing it executed, and the proceeds applied upon it, or by

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showing it unreturned, and the existing power as well as a subsisting duty to apply the proceeds upon it.

Upon this last ground a judgment dismissing plaintiff's complaint reversed, and a new trial ordered; costs to abide event.

(Before DURE, BOSWORTH, and EMMET, J.J.)

October 25 · November 19, 1850.

APPEAL of plaintiffs from a judgment at special term dismissing the complaint. A bill of exceptions taken upon the trial was annexed to the record.

The action was against the defendant, as late sheriff of the city and county of New York, for making false returns to three several executions. The complaint charged, 1. That one Magher, deceased, in his lifetime, on the 18th of October, 1847, recovered a judgment against one Lovell Purdy in the Supreme Court, for \$2000 debt, and \$22.38 costs, upon which an execution in the usual form was duly signed and delivered to the defendant, who by an endorsement thereon was directed to levy the sum of \$1031.96, besides interest and his fees. This judgment, the complaint subsequently alleged, had been assigned to the plaintiffs by the administrator of Magher. 2. That on the same 18th October, 1847, the plaintiffs had recovered a judgment against the same L. Purdy and John C. Holland for \$671.29, damages and costs, upon which an execution was duly issued and delivered to the defendant, who was directed to levy \$672.29, with interest and besides his fees. 3. That on the 11th December, 1847, the plaintiffs recovered another judgment against Purdy for \$422.68, damages and costs, which sum the defendant by an endorsement upon an execution duly issued to him therein, was directed to levy with interest, besides his fees. The two last judgments were in this court. The execution on the first judgment (Magher's) was issued on the 15th October, 1847; on the second, on the 18th November; and on the third, on the 27th December, in the same year. The complaint further stated, that each of the executions was returnable 60 days after its delivery to the defendant, as sheriff, and that at the time of said delivery and during the whole time thereafter, until the return-day of each had expired, there were divers goods and chattels of Purdy within the defendant's county, from which he might and ought to have levied, the

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moneys he was directed to levy by the said executions, and of which he, as sheriff, had notice; that the defendant, regardless of his duty as sheriff, did not and would not collect and pay over to Magher and the plaintiffs respectively the sums of money directed to be levied in their respective executions, but that in the month of August, 1848, he falsely returned Magher's execution and filed the same in the clerk's office of the Supreme Court, with his return endorsed thereon, as follows: "No goods, chattels, or real estate, John J. Westervelt, Sheriff;" and that in the month of June, 1848, he falsely returned the other two executions and filed the same in the clerk's office of this court, with his return endorsed on each of them, signed by him substantially as follows, "No goods, chattels, or real estate."

The complaint then charged, that before the 18th October, 1847, one Charles Vyse issued and delivered to the defendant, as sheriff, an execution against Purdy for about \$1800, by virtue of which the defendant, as sheriff, levied upon goods and chattels belonging to and then in the possession of Purdy, of the value of upwards of \$10,000; that on or about the 31st January, 1848, he sold a part of this property to the value of less than \$2,325, and negligently suffered Purdy to keep the residue and convert the same to his own use; that from the proceeds of this sale the defendant had deducted not only his lawful percentage and fees but various additional charges which were wholly illegal, amounting to the sum of \$439.76, which ought to have been added to the sum of \$55.90, which the defendant, when he returned the execution of Vyse satisfied, admitted to be a balance in his hands.

The plaintiffs demanded judgment for \$1,734, with interest and costs.

The answer denied that the defendant had made false returns on the executions mentioned in the complaint; or had been guilty of the neglect of duty therein charged; or had made or deducted any illegal charges; and stated that when the three executions mentioned in the complaint were delivered to him, he had then in his hands two other executions, one in favor of Vyse and one in favor of one Henry K. Toler, for \$6000 debt, and \$22.38 damages and costs, and that by these two prior ex-

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ecutions the whole of Purdy's property was covered and exhausted.

The plaintiffs, in their reply, averred that Toler's judgment and execution were fraudulent and void as against creditors, of which the defendant, as sheriff, had notice, and that after satisfying Vyse's execution, the property left in the possession of Purdy was more than sufficient to satisfy Magher's and the plaintiff's execution.

The action was tried before Mr. Justice Paine and a jury, on the 24th March, 1851.

The following were the proceedings on the trial, as stated in the bill of exceptions:

The plaintiffs' counsel produced and read in evidence the records of judgment of Toler, Magher and the plaintiffs, alleged in the pleadings.

The judgment of Toler was on bond and warrant of attorney, dated October 11, 1847, and the bond was conditioned, in the ordinary form of a money bond, to pay \$3,000 on demand with interest.

He also produced and read the execution of Toler, a copy whereof is annexed to the answer returned *nulla bona* by defendant, and filed October 2, 1848.

The said bond and warrant did not, either of them, express that any one but said Toler was interested therein.

The said counsel also proved and read in evidence the letters of administration and the assignment by Peter Magher, the administrator therein named, to the plaintiffs mentioned in the complaint.

He then called as a witness

Henry K. Toler, who testified that he was the person who recovered said \$3,000 judgment.

Q.—What was the consideration of such judgment?

This question was objected to by the defendant's counsel and overruled by the court, and the plaintiffs' counsel duly excepted.

The said counsel then offered to show by said witness that said judgment was confessed with intent to hinder, delay and

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defraud the creditors of said Purdy, and that the same, and the execution thereon, were and are fraudulent and void against the plaintiffs.

Whereupon defendant's counsel proposed to show that plaintiffs moved the Supreme Court, in May, 1848, to set aside Toler's and Magher's executions as being fraudulent and void, and also that the moneys in the sheriff's hands after satisfying Vyse's execution, be applied to satisfy plaintiffs' judgments, and that said motion was argued and denied.

The plaintiffs objected to such evidence being introduced, the court excluded it, and defendant's counsel excepted.

The plaintiffs' counsel then proposed to prove by the witness the matters stated in his above offer. The defendant's counsel objected to this evidence that the plaintiffs cannot, in this action, inquire into the *bona fides* of a prior execution, and the court excluded the evidence, and the plaintiffs' counsel excepted.

The court, on the offer of the plaintiffs' counsel, allowed him to give evidence to show the true amount claimed by Mr. Toler, at the time his execution was issued, to be due under his judgment, with a view to show that more money might have been collected by the defendant under the executions in the pleadings mentioned than enough to pay such amount.

The defendant's counsel then, on notice, produced the paper, of which the following is a copy, which he admitted to be genuine, and to have been served by Brady and Maurice, attorneys for Toler and for Olsen, on the defendant at the date thereof, to wit:

SUPREME COURT. *Henry K. Toler v. Lovell Purdy*.—Judgment docketed October 18, 1847, for \$6,000 debt and \$22.38 damages and costs. I do hereby certify that the judgment in this cause includes the debt due by the above named defendant, Lovell Purdy, to Andrew J. Olsen, which amounted at the time said judgment was docketed to the sum of nine hundred and fifty-one dollars, and I do hereby stipulate that the sum so due the said Andrew J. Olsen, with the interest thereon, is payable and shall be paid out of the proceeds arising from the execution issued in this

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cause, and now in the sheriff's hands, next after paying the law expenses on such judgment and execution, and my debt included, in said judgment (and which debt amounted to the sum of one thousand three hundred dollars at the time said judgment was docketed), and the interest accrued thereon, and in case the proceeds of such execution shall be insufficient to pay in full the amounts so due to me and the said Olsen, respectively, as aforesaid, he the said Olsen shall be entitled to receive, and shall receive the whole residue of such proceeds after payment of the law expenses aforesaid, and my demand for principal and interest in full.

Dated, New York, December 27th, 1847.

HENRY K. TOLER.

Witness—*James Maurice.*

I assent to the within arrangement.

Dated, New York, December 27th, 1847.

ANDREW J. OLSEN.

Witness—*James Maurice.*

In consideration of the within agreement and of the sum of one dollar, I do hereby agree to the within and all the stipulations therein contained.

Dated, New York, Dec. 27th, 1847.

L. PURDY.

Witness—*John D. Burchard.*

The plaintiffs' counsel under objection then read such paper in evidence.

The said witness then testified further, as follows, to the admissibility whereof defendant's counsel objected, and the court reserved the point.

On October 18th, 1847, Purdy owed me \$854.30 for goods sold and delivered, and that was all he owed me. No other paper than that above specified, was signed by me before that date. At the time Purdy confessed that judgment to me, the understanding between us was, that it was for myself and for others, and those others I cannot state that he named at that time. The first man I remember to have heard named as a

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party interested in the judgment after me, was Olsen. I had nothing to do with the naming of the creditors to be interested therein.

Q.—Did you feel yourself obligated to let in such men as he chose to name?

A.—Of course if he named them they would be admitted.

Q.—What was done between you and Purdy, before this paper was signed, to deprive him of the right to name any other person than Olsen, to come in his place?

A.—Nothing that I remember.

Being cross-examined, the defendant's counsel produced an original sworn deposition of the witness relating to said judgment, and the consideration and particulars of the same, and the understanding between him and Purdy, and read the following portions thereof to the witness.

Q.—Was any one but yourself and Mr. Purdy, and who present, when it was said that such judgment was to be for the benefit of any other creditor than yourself, and was any one knowing to such understanding at the time, and who?

A.—It was in the presence of Mr. Magher, and Mr. Treadwell I think was there at the time.

Q.—Where, for the first time, did Mr. Purdy state to you the names and amounts of the several creditors whose debts were or are included in such judgment.

A.—To the best of my knowledge and belief, he spoke of Mr. Olsen as one he wanted to be included in the judgment after me, and I think that was before he confessed judgment to me, but he did not give me any other names at that time, but said he wanted to include others; I did not ask him who they were.

The other names were given some time after; Mr. Olsen's name was given to Mr. Maurice about three or four weeks before the bill in chancery was filed, and the list of the other names was given to me by Mr. Purdy a day or two after Mr. Olsen's name was given to Mr. Maurice. Mr. Maurice is my solicitor in this case, and was Mr. Olsen's attorney at that time.

The witness continued:—It was also understood when the judgment was confessed that it should cover any future sales or

advances I might make to Purdy. Purdy suggested to enter it up for more than was due to me with that view.

The direct examination was resumed. The witness continued:—I think, but am not sure, that Magher and Treadwell were present when Purdy said it was for other creditors. I think both were present. After October 18th, and before November 18th, 1847, I sold Purdy goods to the amount of \$86.55. In November I loaned him in money \$170, and the interest on the original account was \$14.77. These amounts, with the \$854.30, state all my interest in the judgment. No one was present at or knowing to the agreement concerning future sales or advances but myself and Purdy. It was not contemplated at that time, that any money was to be loaned. When I lent it he promised to repay it in a week. I do not recollect that anything was said at the time the judgment was confessed that it was to cover future advances in money, and at the time of the loan I do not think anything was said about its being covered by the judgment. There was no agreement that I should make future sales or advances. The items above stated are all the interest in the judgment I ever had.

The plaintiffs' counsel then called as a witness, *John J. V. Westervelt*, the defendant, who testified that he had no knowledge of any interference with the deputy in the answer named, or instructions given to him by Magher, or the plaintiffs, or either of their attorneys.

The plaintiffs then called as a witness, *Lovell Purdy*, who testified that he formerly carried on business at 483 Broadway, where the goods and chattels sold by the defendant as in the pleadings mentioned were situate. That such sale took place January 31, 1848. That no person was ever left there before the sale by the deputy, to take charge of such goods and chattels, but the deputy was in the habit of visiting there every few days. It was a club house.

He further testified, that the defendant's deputy left goods and chattels in his (witness's) possession after such sale, that the same was on such premises before and at the time of such sale, and that there was no property removed by him, the witness,

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after such sale, which had not been there before such sale, and subject to the inspection of said deputy.

The witness further testified that, in April, 1848, he removed such property from such premises, and afterwards sold it.

He testified, on his cross-examination, concerning its value, and to the effect that a part of it was purchased by his brother, who paid \$250 for it about a year before he started the club house, which was in the spring of 1847, and to the effect that his brother owned such part, and the residue belonged to himself, also concerning its being exempt from execution.

He also testified concerning the manner in which the property so left in his possession was selected, and that he desired the deputy to leave the piano, which he refused to do.

The court here adjourned to March 25, on which day, at the opening of the court, the defendant's counsel stated that the witness Toler desired to make an explanation.

The said witness, being interrogated by defendant's counsel, stated as follows :

I gave Mr. Purdy credit for \$135, bills receivable, which were not paid, and omitted to charge them back to him on my books.

Being cross-examined by plaintiffs' counsel, he said : They were three notes of different persons, endorsed by Purdy. I cannot state whether they were protested. I think demand was made on the makers, but am not sure. Purdy had notice the next day. They had matured when the deposition was taken, which has been referred to by defendant's counsel, I suppose.

The plaintiff's counsel then called as a witness,

Edward F. Treadwell, who testified that he was the attorney who entered up the judgment of Toler and Magher, mentioned in the pleadings.

On objection to a question, the court required the plaintiffs' counsel to state what he expected to prove by the witness.

He answered that he expected to show that Toler and Purdy

came to him to enter up the judgment of Toler; that Purdy directed him on that occasion as to the amount in which it was to be entered, and that nothing was said or agreed on as to its being for any other than Toler's debt.

Also, that, as the attorney of Magher, he notified the defendant, in writing, before the sheriff's sale, that Magher claimed in opposition, and in preference to the claim of Toler.

The court rejected such proffered testimony, and the plaintiffs' counsel duly excepted.

The court then ruled that the plaintiffs' counsel could not go into evidence to reduce the amount of Toler's claim under his judgment, unless he first showed that he (Toler) informed the defendant of it, so as to preclude himself from making any claim.

The plaintiffs' counsel duly excepted.

The witness continued: I never interfered with the deputy by giving him instructions or otherwise.

Being cross-examined, the defendant's counsel produced the following paper which he said was delivered to the deputy sheriff at its date.

"SUPREME COURT.—*Charles Vyse v. Lovell Purdy*.—We consent that the sale under the executions in this cause, and those we respectively hold, be adjourned 30 days without prejudice to any party.

"New York, December 27th, 1847.

"Edward F. Treadwell, Att'y for Magher.

"Edward F. Treadwell, Att'y for Henry K. Toler.

"Robert H. Shannon, Att'y for Mrs. Hays.

"Samuel G. Raymond, Att'y for Pl'ff."

The witness testified that the signature of his name to such paper was genuine; that he thought he gave the same to the attorney of Vyse, and did not give it himself to the defendant or his deputy.

The plaintiffs' counsel then called as witness,

Angelina Brown, who testified that she moved into the house, 483 Broadway, April 7, 1848, and found Lovell Purdy

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there. He moved out two or three weeks after witness moved in. The house was a large double house, four stories high, besides the basement.

Q. What property was there in that house when you moved into the same, in the possession of Lovell Purdy?

The defendant's counsel objected, unless plaintiffs show it was there at the time of the levy, or the sheriff had knowledge of it; and the court overruled this question, and the plaintiffs' counsel objected.

The plaintiffs' counsel then offered to show by the witness, that, on April 7, 1848, the said Purdy had goods and chattels in that house of the value of several thousand dollars, and that he thereupon removed the same.

The offer was overruled by the court, and the plaintiffs' counsel duly excepted.

The plaintiffs' counsel then called as a witness,

John Fleming, who testified that he boarded with said Purdy at said house, before and up to the sheriff's sale; that he remained there afterwards and boarded with Mrs. Brown, the last witness, until Purdy left; that before the sale the house was well furnished.

Q. Can you state the value of the goods and chattels belonging to said Purdy in that house, before and at the time of the sheriff's sale, and if so, state?

The question, on objection by defendant's counsel, was overruled by the court, and the plaintiffs' counsel excepted.

The court here ruled that the plaintiffs could not recover, unless they showed more property than enough to provide for the debt of Toler, and the debt of Olsen, both as specified in said agreement of Dec. 27, 1847, and the plaintiffs' counsel excepted.

The plaintiffs' counsel here stated that he had further and other evidence to offer, but, under the ruling of the court upon the several points and questions raised, he should offer no more testimony.

The defendant's counsel moved for a nonsuit.

The court granted the motion, and the plaintiffs' counsel duly excepted

A motion for a new trial upon the exceptions taken on the trial was subsequently made at a special term, and denied with costs.

C. H. Smith, for the plaintiffs, now moved for a reversal of the judgment, and a new trial; and relied upon the following points and authorities.

I. In an action for the false return of the *feri facias*, where the sheriff retains the proceeds of the property sold for unfounded claims of his own (*e. g.* fees not warranted by law, or pretended disbursements never incurred, or where he omits to levy, or having levied negligently loses the property levied on), the plaintiff, in answer to a defence of a judgment and execution, prior to that of the plaintiff, which would have consumed the whole avails, had the sheriff done his whole duty, and where he has returned such prior execution *nulla bona*, may show such prior judgment, and, consequently, the execution to be fraudulent. (2 R. S. 3d ed., 197, § 1, 5; 2 Phillip's Ev. 404, 405; 2 Greenleaf, § 585, 593; *Warmoll v. Young*, 5 Barn. & Cress. 660; *Fairfield v. Baldwin*, 12 Pick. 388; *Harrod v. Benton*, 8 Barn. & Cress. 219; *Saunders v. Bridges*, 8 B. & Ald. 95; *Pierce v. Jackson*, 6 Mass. 242; *Clark v. Foxcroft*, 6 Greenleaf, 296; 7 id. 848; *Holbird v. Anderson*, 5 T. R. 235; *Townsend v. Kerns*, 2 Watts, 180; *Imray v. Magnay*, 11 M. & W. 267; see *Remmett v. Lawrence*, 1 Eng. Law & Eq. Rep. 260; *Adams v. Balch*, 5 Greenleaf, 188; *Com. Bank v. Wilkins*, 9 id. 28; *Rogers v. Sumner*, 16 Pick. 387.)

1. The court below rejected this proposition by an erroneous application of the principle, that an officer is protected by his process for all acts done under and in obedience to it. That, as a general principle, is fully conceded, but it does not conflict with the above position: on the contrary, it is here sought to be used as a protection for acts done in violation of the process, and instead of being solely available to protect the innocent and faithful officer, if the ruling below is correct, it is equally efficacious to shield and facilitate the too common practices, an aggravated instance of which is not only admitted by the answer, but fully proved in the evidence, where the sheriff

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admits by his oath the charge of having deducted out of a collection of \$2,800, the sum of \$439.76 for services, not only imaginary in fact, but which it is illegal as well as criminal to charge for, if in fact rendered, and which enormities have been thus far triumphantly and profitably sustained. (*Warmoll v. Young*, supra; *Fairfield v. Baldwin*; *Camp v. Chamberlain*, 5 Denio, 198.) 2. The evidence is admissible, without affirming that it is so in all cases where the sheriff is not chargeable with malfeasance, because it shows that if the sheriff had done his duty and had, as he ought to have had, a fund ready to be paid over to whoever was entitled to it, the plaintiff would have had the right by proceeding to have the fraudulent judgment vacated, to be paid first out of the proceeds, and because it shows the sheriff has deprived the plaintiff of an opportunity to collect his debt in that way. (Cow. notes to Phil. Ev. n. 741, p. 1090, &c.) 3. Having returned the Toler execution *nulla bona*, he is estopped to say that it was at any time a valid lien upon the property; in other words, he cannot say that it is a false return. 4. The plaintiff was not bound to proceed by motion or suit, to set aside the Toler judgment before bringing suit against the sheriff. As this case stood at the trial that execution had been got out of the way by the sheriff's return of *nulla bona*; but if it had remained in his hands unreturned, it would have made no difference. (a.) His cause of action accrued, if at all, upon the return of his execution *nulla bona*. The statute of limitations began to run at that time. If a motion had been made and denied it would not have been conclusive. (*Simpson v. Hart*, 14 J. R. 63.) Such a motion might have resulted in a feigned issue. The same principle would compel a party to prosecute that to an end, or else, if the motion should be denied, to proceed by suit against the prior judgment creditor, and, if then successful, a suit against the sheriff would be as necessary, in a case of this kind as before, and thus two suits be necessary to enforce one right. Neither law nor justice imposes on a party the expense or delay which would thus result. (b.) In a case where the sheriff has done his whole duty, and has the money ready to be paid over to the party, upon his having prior judgment declared fraudulent, he is undoubtedly, or ought to be, entitled to protection. In such a

case, the court might either enlarge the time to make his return, or, if suit should be brought, might stay the proceedings until the prior execution should be set aside. But whether so or not, makes no difference in this case—certainly he could never be relieved in that way, unless he shows clean hands, and is free from all negligence and collusion. And so it has been held under the English interpleader act. (1 Smith's Leading Cases, (1837), 429, 30, margin 240; *Duden v. Long*, 1 Bing. N. C. 300; *Ostler v. Bower*, 4 Dowl. 259; *Braine v. Hunt*, 4 Tyrwh. 244; *Cook v. Allen*, 3 id. 586.)

II. The judge erred in nonsuiting the plaintiff also, because it appeared the prior executions, both of Vyse and Toler, were dormant. This fully appears by the answer, setting up consents to delay by all parties, the defendant's testimony, exempting the plaintiffs from this charge, leaving it to stand against the Vyse and Toler executions, and the consent, in writing, of all parties but the plaintiffs. The answer admits, besides the full amount of Vyse's execution, that he received \$439.76, which he kept for a bad reason, and \$52.24 more, which he kept without any reason. (Smith's Leading Cases, ed. 1847, p. 7; *Bradley v. Windham*, 1 Wils. 44; *Benjamin v. Smith*, 4 Wend. 332; *Kellogg v. Griffin*, 17 J. R. 275, id. 332; *Camp v. Chamberlain*, 5 Denio, 198.)

III. The court erred also in the following particulars. 1. In ruling out the two facts proposed to be proved by Treadwell. In reference to the second of those facts it was competent to show the sheriff had notice. (*Camp v. Chamberlain*, supra.) 2. In ruling as stated, that plaintiffs could not go into evidence to reduce the amount of Toler's claim under his judgment. 3. In overruling the question to the witness, Angelina Brown, and the offer of testimony by that witness. The plaintiff had given testimony by Purdy, to show that the property was on hand at the time of the levy, &c. 4. Also, in overruling the question to John Fleming.

IV. Upon the evidence given the plaintiff was entitled to recover, and the court erred in granting a non-suit.

A. J. Vanderpoel, for the defendant, resisted the motion upon the following grounds.

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I. The return by the sheriff of *nulla bona* was *prima facie* evidence in his own favor, and must be taken as true until satisfactorily contradicted by the plaintiffs. (*Browning v. Hanford*, 7 Hill, 120.)

II. The ruling of the justice that the plaintiffs could not recover unless they showed more property than was sufficient to provide for the debt of Toler and Olsen, both as specified in the notice or agreement of December 27, 1847, was correct until this was proven; it is clear that the plaintiffs had not sustained any injury, and the nonsuit was therefore properly granted. (*Wittle v. Freeman*, 1 Gale & D. 93; S. C. in 11 Ad. & E. 539; Id. in 5 Jurist, 960; *Champenois v. White*, 1 Wend. 92; *Ramsey v. Norrabbell*, 3 Per. & D. 253.) (a) Had the sheriff wholly neglected to sell, he would not be liable to a junior execution creditor where the property attached or levied upon would be insufficient to satisfy the former executions upon it. (*Smith v. Hogan*, 4 Ala. 93; *Gains v. Downs*, Harper, 72.)

III. The evidence offered to impeach the judgment in favor of Toler was properly rejected; it would have only been proper after having shown that the sheriff was indemnified or was a party to the fraud, for if indemnified he would stand in the place of the first creditor; if a party to a fraud he would not be entitled to any favor before the court, and must make good to a creditor any loss his fraudulent conduct may have occasioned. (a) The sheriff is bound to execute all process regular upon its face, and in an action against him for money had and received, it would be unnecessary for Toler to prove anything more than the delivery of his execution to him, and the receipt of the money. (*Earl v. Camp*, 16 Wend. 566; *Laroton v. Erwin*, 9 Wend. 233, 237; *Elliot v. Cronk*, 13 Wend. 35.) (b) In an action against him for not levying, he can only impeach the judgment when it has been obtained by fraud, and cannot go into evidence of collateral fraud. (*Tyler v. the Duke of Leeds*, 2 Stark R. 218; *Adams v. Balch*, 5 Greenl. 188.) (c) There was nothing on the face of the execution or judgment to exempt the sheriff from his ordinary liability to the plaintiff in the process. (d) The plaintiffs did not offer to show that the sheriff had any notice of the alleged fraud, but only that Magher claimed precedence of Toler. (e) The sheriff is not bound to

try, and cannot try the question of fraud, or decide which of the parties is entitled to a preference. He must execute the writs according to their priority. Toler not having indemnified the sheriff, would not be bound by a judgment against him determining his, Toler's, execution to be fraudulent and void; but the defendant, if a recovery is allowed in favor of plaintiff, would be made answerable to both execution creditors. In *Barber v. Mitchell*, 2 Dowl. P. C. 574, Patteson J. expressed his opinion that a judgment could not be shown to have been fraudulent as against creditors in an action against the sheriff, unless it appears he was a party to the fraud. So in *Wintle v. Freeman*, 1 Gale & D. 98, it was held it was not competent for the plaintiffs to give evidence impeaching the validity of the execution unless the sheriff is indemnified. (*Warmoll v. Young*, 8 D. & R. 448.) S. C. in 12, E. C. L. R. 847, decides the same point; the sheriff was made liable, however, in that case, because by unfair conduct he had prevented the plaintiff in the second process from making his motion, and thus lent himself to the other party. In *Lovick v. Crowder*, 8 B. & Cr. 132, and 2 Man. & Ry. 84, the execution was delivered to the sheriff under such circumstances of fraud as to make him a party to it. *Rich v. Bell*, 16 Mass. 294, was case against an officer for neglecting to keep goods attached by him, so that they might have been taken in execution, although the officer had neglected his official duty, yet it appearing that if he had adhered to it the plaintiffs would have derived no benefit from their attachment, they were held entitled to nominal damages only. *Saunders v. Sheriff of Middlesex*, 3 Barn. and Ald. 95, will not aid the plaintiff. There the sheriff had the moneys in his hands, and the first execution was set aside on motion, then instead of applying the money on the second execution, and without giving any notice to the plaintiff therein that the first execution was set aside, he paid the money to the defendant and returned the execution *nulla bona*. (1 Law Reg. R. 210.) Although two years and a half had elapsed intermediate the collection of the moneys and the commencement of this suit, it does not appear on behalf of the plaintiffs that they ever took any steps to set aside Toler's judgment and execution. Nor did they seek to show that the sheriff had been guilty of any

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fraud, collusion, or favoritism, or in any manner so conducted himself as to affect their position with relation to the Toler execution and judgment, or embarrass them in their efforts to avoid it, but the defendant offered to show that the whole matter had been adjudicated and determined against the plaintiffs.

IV. There was no evidence of fraud in Toler's judgment; the agreement of the 27th of December, 1847, was no evidence of fraud, but rather proves the good faith of the parties. (a) A judgment or a mortgage may be taken to secure a present indebtedness and future liabilities or advances. (*Livingston v. Tracy*, 16 John. 165; *Bk. of Utica v. Finch*, 3 Barb. Chy. 293.) (b) It may be shown by parol, and need not appear on the face of the judgment or mortgage. (*Truscott v. King*, 6 Barb. S. C. R. 346.) (c) Nor did it invalidate the judgment that it was confessed to Toler for the benefit of himself and others. (*Truscott v. King*, 6 Barb. S. C. R. 346; *Commercial Bank v. Cunningham*, 24 Pick. R. 270.) (d) There was no evidence that Purdy had any more property than was sufficient to satisfy the debts of Vyse & Toler—the presumptions are in favor of the truth of the return. (6 Hill. 242.)

V. The judge properly excluded the evidence offered of the value of the goods in the house occupied by Purdy on the 7th of April, 1848. The sheriff could not levy the execution after its return day. (*Vail v. Lewis*, 4 John. 450; *Shelton v. Westervelt* in this court not reported.*) (a) No offer was made to show the value of property in Purdy's possession during the lifetime of the execution, so that the sheriff's return stands wholly unimpeached.

VI. By the instructions to the deputy the attorneys made the deputy their private agent, and thereby discharged the sheriff. (*Gorham v. Gale*, 7 Mass. 739; *Mickles v. Hart*, 1 Denio, 548; *Walker v. Haskell*, 11 Mass. 177; *Corning et al. v. Southerland*, 3 Hill, 552; *Walter v. Sykes*, 22 Wend. 566.)

VII. The judgment of the special term should be affirmed with costs.

* Reported 1 Duer, 109.

BY THE COURT. BOSWORTH, J.—When the three executions first named in the complaint were returned, the execution in favor of Toler was in the sheriff's hands unreturned. It was regular on its face, and assuming it to be valid, it was the duty of the sheriff to apply upon it any surplus remaining, after satisfying the execution in favor of Vyse. Assuming the Toler execution to be valid, and that it had not lost the priority which its prior delivery acquired, the return made to each of the three executions, by virtue of which the plaintiff claims, was a true return. Purdy had no property out of which any part of either of those three executions could be collected.

The mere fact, that the judgment in favor of Toler was confessed to secure as well a debt owing to Olsen, as one owing to Toler, did not render it void (*Truscott v. King*, 6 Barb. S. C. R. 346; *Bank of Utica v. French*, 3 Barb. Chan. R. 293; *Livingston v. Tracy*, 6 J. R. 165). Nor is there any such evidence of an effort to collect more upon it than was due to the two, as would justify the sheriff in acting upon the presumption that it was confessed with an intent to defraud creditors, or would authorize a jury to find, or the court to declare, that it was confessed with such an intent.

Is there any such evidence of interference by the plaintiff in the Toler execution, or by his attorney, to delay a sale, or to give indulgence to the judgment debtor, as in judgment of law will deprive it of its priority?

Prior to December 27, 1847, there is no evidence of anything more than mere *acquiescence* on the part of Toler, in the delay to sell up to that time. His execution was returnable on the 17th of December, 1847. The sheriff could not have been coerced to sell sooner than on that day. If he had sold and returned the execution on that day, he would have completed its execution within the time allowed by law. On the 27th of December, after the lapse of ten days from the return day, the attorney of the plaintiff in the Toler judgment, and also the attorney in the Magher judgment, and the attorneys of the plaintiffs in two other judgments, consented that the sale under their executions might be adjourned thirty days, without prejudice to any party. This consent was sent to the deputy sheriff, and not to the judgment debtor. Why it was obtained or

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given is not shown. The court has no fact before it, but the fact that such a consent was given. The paper does not, in terms or by implication, authorize the sheriff to leave the property with the judgment debtor, or absolve him from liability for its safe keeping. It would, perhaps, be an answer to an action by either of them against the sheriff for not returning his execution within those thirty days. It merely permits him, in his discretion, to adjourn the sale thirty days, which implies that he had already given notice of a sale to be had under these executions. There was no agreement for delay between either of those plaintiffs and the judgment debtor. The consent, standing alone, would seem to amount to no more than a declaration on the part of those giving it, that they would acquiesce in a further indulgence for the period of thirty days, but it is not an agreement with the debtor that he shall have such indulgence, or the use of the property for that period. Certainly it does not instruct the sheriff to delay the sale.

In *Russell v. Gibbs* (5 Cowen, 395), the court remarked: "But to say that an implied indulgence of six months, when no other creditor was pressing, is such a culpable negligence as to become *per se* evidence of a fraudulent intent to cover the defendant's property, and to delay and hinder his other creditors from collecting their just debts, would be judging very harshly of the motives of our fellow-citizens, and inculcating a degree of rigor, which may become highly oppressive to unfortunate debtors."

In *Benjamin v. Smith* (4 Wend. 332), Rathbun & Hunt, in March, 1827, directed the sheriff not to sell on an execution in their favor, which he had levied on the property of the debtor, until the first of July. After the first of July, their conversations with the deputy induced him to believe, and act on the belief, that he was to have further orders before acting, and the court thought such an inference might be drawn by the jury, and if drawn, the execution would be dormant as against one levied on the 23d of October, 1847. The court said, that the proper instruction to be given to the jury on a new trial was, that they should "find the first execution dormant, or fraudulent, as to the execution of the plaintiff, if the delay on it,

down to the time of the sale, was occasioned by the interference of the plaintiffs therein."

In *Benjamin v. Smith*, the court refers to *Russell v. Gibbs*, as containing an accurate statement of the principles applicable to this point. *Benjamin v. Smith* again came before the court, after it had been tried a second time. On the second trial the jury were instructed, in conformity with the rule laid down in 4th Wend. 336, and found a verdict for the defendant. The court said the verdict could not be interfered with, on the ground that, that fact was found "against the weight of evidence. There was sufficient doubt in the case to preclude the interference of the court with the finding of the jury." (12 Wend. 406.)

Where the lapse of time has not been so great, as of itself to justify an inference, that the prior execution was used as a mere cover to protect the debtor's property, something more than mere acquiescence in the property being left with the debtor, or an express permission to so leave it, or an acquiescence in a delay to sell, whether that acquiescence be implied or expressed, is necessary to raise an inference that the prior execution is fraudulent.

Where there has been no agreement with the debtor for further time, nor any instructions to the sheriff to delay a sale, nor interference to prevent him from discharging his duty, a delay, on his part, to sell for forty-seven days, after the return day of the execution, acquiesced in by the plaintiff will not, of itself, authorize the jury to find, or the court to declare, the prior execution dormant, or what is treated as the same thing, fraudulent.

Rew v. Barber (8 Cowen, 280): This is the extent of the proof given, or offered on this point.

If the Toler execution had become dormant, the Magher execution, on which the plaintiffs claim, had also become dormant, as the attorney in that consented to the adjournment. Hence the plaintiffs, in order to establish a right to have the execution issued on the judgments recovered in their favor, declared to be entitled to a priority, must concede that the Magher execution, by virtue of which they also claim to recover, became dormant or fraudulent as to their other two

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executions, by reason of the consent to the adjournment of the sale.

We do not think that the proof given shows *prima facie*, that either execution had become dormant, or fraudulent, as to either of the junior executions.

The important question presented by the record is, was it competent for the plaintiffs to show, in this action, that the Toler judgment was confessed with intent to hinder, delay, and defraud the creditors of Purdy?

It is a general rule, that a sheriff who receives a process issuing out of a court of general jurisdiction, and regular on its face, is bound to execute it. Though it may be voidable, it is not so at his election, but only at the election of the party affected by it. If not void, but irregular only, it is a protection to him, and he must obey its mandate. (*Parmele v. Hitchcock*, 12 Wend. 96; *Saracool v. Boughton*, 5 Wend. 170.)

Process regular on its face, though in fact void for the reason that the pre-requisites to conferring jurisdiction were not complied with, will protect the officer acting under it from an action by the party against whom it is issued. Yet the party at whose instance it was issued cannot justify under it, nor maintain an action against the officer for refusing to execute it. When sued by the plaintiff he may show in his defence that the process was void, for want of jurisdiction of the court issuing it. (*Horton v. Hendershot*, 1 Hill, 118; *Earl v. Camp*, 16 Wend. 562.)

The Revised Statutes declare that every "suit commenced, decree or judgment suffered, with the intent to hinder, delay, or defraud creditors," as against the persons so hindered, delayed, or defrauded, shall be void. (2 R. S. 137, § 1.)

The plaintiffs' counsel offered to show that the Toler judgment was confessed with intent to hinder, delay, and defraud the creditors of Purdy, and that the same and the execution, were and are fraudulent and void against the plaintiffs.

The reply alleged that the sheriff had notice of this fact before he sold on the execution.

The objection taken to the evidence offered was not that the plaintiffs' offer was not broad enough—not that he did not also offer to show notice to the sheriff, but it was, that the *bona fide*

of the prior execution could not be inquired into in this action, and on such objection the evidence was excluded.

At a later stage of the trial the plaintiff offered to prove facts tending to impeach the *bona fides* of the Toler judgment, and that the defendant, before the sale, was notified by the attorney in the Magher judgment, that Magher claimed in opposition, and in preference to the claim of Toler. The court excluded the evidence.

The case shows, as I think, that the evidence was excluded expressly on the ground that the sheriff could not be charged by proof in this action—that the Toler judgment was fraudulent and void as against creditors, although the defendant was so notified before he sold on the execution.

The plaintiff insists that it was competent to prove those facts, and that proof of them would establish the falsity of the returns to the executions in question.

It is to be observed that the proof offered does not relate to the jurisdictional capacity of the court to render the judgment and award the execution; but it is offered on the assumption, that conceding such jurisdiction, the judgment may, in this action, be shown to be void, as to creditors of the debtor, though conclusive as between the parties to the record, and if so shown the sheriff will be liable.

On the assumption here made of the ground on which the evidence offered was excluded, this case presents the question—whether a junior execution creditor, in an action against the sheriff for falsely returning it *nulla bona*, can maintain his action by proof that a prior execution was issued on a judgment confessed with intent to defraud creditors, and of a notice to the sheriff of that fact, while both executions were in his hands, and of a claim made on that ground to have the proceeds of the property levied on applied on his execution?

Several cases have been cited by the plaintiffs' counsel, which are claimed to have settled that question in the affirmative.

In *Warmoll v. Young*, 5 Barn. & Cress. 660, the sheriff was notified on the 29th of December, 1824, the ninth day after receiving the junior execution, to retain the proceeds of the property levied upon in his hands, as proceedings would be

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taken to set aside the prior judgment and execution. A few days thereafter the sheriff was ruled to return the prior execution. He gave no information to the plaintiff that he had been so ruled, but paid over the proceeds to the plaintiff in the prior execution on the 31st of January, 1825.

The prior execution, and the judgment on which it was issued, were proved to be fraudulent, and the plaintiff in the previous execution was permitted to recover.

Abbott, Ch. J., said: "It appears to me that it was the duty of the sheriff, when served with the rule to return Knight's writ, to inform the present plaintiffs of it, that they might consider whether they could take steps promptly to set aside the judgment. If he had informed them of it, and they had taken no steps, there would have been strong ground to maintain that the sheriff was justified in obeying the process that came to his hand. Not having so informed the plaintiffs, I think the sheriff appears to have lent himself to Knight, and therefore he must stand or fall by the right that Knight had, and Knight had no right, for his judgment was evidently fraudulent."

Bailey, J., seems to have concurred in deciding the case on this principle. He expressly says: "That the sheriff was not bound to try the question of fraud, or to decide which of the two creditors should have the preference, but he ought to have stood indifferent between the parties, and not to have lent himself to either."

Holroyd, J., said: "I have entertained some doubt, in the course of the argument, whether the present plaintiffs ought not, in pursuance of the notice they gave to the sheriff, to have applied to the court, within the first six days of the term, to set aside Knight's execution, and to have the money paid over to them. But I incline to think that it was the duty of the sheriff to have informed the plaintiffs before he paid the money that he had been served with the rule to return the writ."

If *Warmoll v. Young* states the rules applicable to such a case correctly, then it must be considered as a principle of law, that a sheriff is not bound to decide on the *bona fides* of judgments on which the executions in his hands have been issued, nor wait an indefinite time for a junior execution plaintiff, to institute proceedings to avoid a prior execution, on the ground

that though valid as against the parties to it, it is void as against himself.

It is distinctly declared, that the sheriff is not bound to take the risks of any such controversy. He is bound to do no act to defeat an avowed purpose of a junior execution creditor to institute proceedings to set aside the older writ. If he is distinctly notified that such proceedings will be taken, and is requested to retain the money levied until such proceedings can be had, and then pays over the money before the claimant is chargeable with laches in not applying, or under such circumstances as will implicate him, as acting in concert with the plaintiff in the older execution, he pays it over at the risk of being held liable, if the prior execution and judgment shall be proved to be fraudulent.

The notice to the sheriff, which was offered to be proved, was given before the sale of the property, which took place on the 31st of January, 1848. None of the executions belonging to the plaintiffs were returned until the subsequent June; over four months elapsed between the time the notice was given to the sheriff and the time he returned the executions.

He was not bound to wait longer than this; and he was not bound to take upon himself the risk of deciding whether the claim made was or was not well founded.

It is the duty of a junior execution plaintiff, who claims that a prior execution is fraudulent as against him, as a creditor of the execution debtor, to move without any unreasonable delay, and procure a stay upon the sheriff's returning the prior one, until the motion can be heard and decided. Nothing of the kind appears to have been done or attempted by these plaintiffs. In making this observation, I lay out of view the evidence offered by the defendant and rejected by the court, that these plaintiffs, in May, 1848, moved the supreme court to set aside Toler and Magher's executions as being fraudulent and void, and that the sheriff, after satisfying Vyse's execution, pay the surplus to these plaintiffs, and that such motion was argued and denied.

I can conjecture no reason why this evidence was rejected, except that it was the opinion of the presiding judge that an action against the sheriff for falsely returning *nulla bona* to a

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junior execution would not be sustained merely by proof, that a prior judgment and execution were fraudulent as to creditors, and that the sheriff had been notified that the proceeds of the sale would be claimed by the plaintiff in the junior execution on that ground, and that therefore the evidence offered and rejected was immaterial.

Inray v. Magnay, 11 Meeson & Welsby, 273, seems to decide, that it was competent for the plaintiffs in this action to prove the execution fraudulent, when coupled with proof of notice to the sheriff that the proceeds of the sale would be claimed on that ground.

But in *Remmett v. Lawrence*, 1 Law and Equ. R. 260 (decided in 1850), *Inray v. Magnay* was doubted by the Queen's Bench, and the decision made on it is, in our judgment, justly characterized as one "placing a sheriff in a most perilous position, whatever course he pursues."

In *Lovick v. Crowder*, 8 Barn. & Cress. 132, the sheriff was held liable. The court said, that when he found the defendant in possession of property, *prima facie*, it was his duty to levy on it. When he was informed that the officer of the former sheriff claimed it under a levy, it was the defendant's duty to ask to see the warrant or execution. If he had done that, he would have known from its date, that there had been such gross delay as rendered it fraudulent and void. The most this case decides is, that when the sheriff knows of incontrovertible facts, or by discharging his duty would ascertain the existence of such facts, which would render a prior execution fraudulent, it is his duty to treat it as such, and if he does not so treat it, he is liable to the plaintiff in the junior execution.

Fairfield v. Baldwin, 12 Pick. 388, is distinguishable from the case before us. In the former, the plaintiff in the prior attachment added, under leave of the court, new counts in addition to the two set out in his attachment. The court held, that this, as matter of law, vacated the attachment as against a subsequent attaching creditor. On the day execution was issued on the judgment recovered in that action, Fairfield notified the sheriff that the attachment, if ever valid for any purpose, had been discharged by "such proceedings as had since been had in that suit," and that, as the next attaching creditor, he should

claim to hold the goods attached to satisfy any judgment that might be recovered in his action. Fairfield prosecuted his suit diligently to judgment and execution, and required the sheriff to levy the execution on the property attached. Baldwin, however, returned that the property had been applied in part satisfaction of the execution in the first attachment suit, and returned Fairfield's execution in no part satisfied.

If the amendments, adding causes of action to those stated in the attachment itself, had the effect, as matter of law, to vacate the first attachment as against one levied subsequently, but before the amendments, then the sheriff who executed both writs, when notified that such proceedings had been had in the first suit as to produce this result, was notified of a fact, or had such notice that on inquiry he might easily have ascertained the existence of a fact in itself incontrovertible, which made it his duty to apply the proceeds of the attached property on the plaintiff's execution: this would decide the whole case, on the principle on which *Lovick v. Crowder* was decided.

The plaintiff was also permitted to prove that the prior judgment was fraudulent, on the ground that part of the sum recovered was not justly due. This was allowed, notwithstanding that suit was defended by the present plaintiff, under a statutory provision, allowing a subsequent attaching creditor to defend. The court, in its opinion on this branch of the case, lay stress upon the fact that the sheriff sold the goods under the first attachment, before a judgment was recovered, notwithstanding Baldwin had notified him he should resist the claim in that case as fraudulent, and also objected to any sale being made until judgment should be rendered in due course of law. This part of the opinion proceeds on the ground that the acts of the sheriff indicated that he had attempted to aid the views of the creditor first attaching, and the court said "he must stand or fall according to the rights of the party to whom he has lent his aid." The ground on which the decision relating to this branch of the case was placed, is the same that governed the court in the decision of *Warmoll v. Young*. It is not an authority for the proposition that a sheriff holding two executions, who is notified by the owner of the junior one, that he shall insist that the junior one is issued on a judgment

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fraudulent as against creditors, is bound to incur the risks of a litigation of that point, or to hold the proceeds of the property levied on an indefinite period of time, at the peril of being charged by the junior execution creditor with the consequences of a false return, if he applies the money to satisfy the one first levied, and returns the other *nulla bona*. No such general proposition is affirmed by the court; on the contrary, its decision is placed on different grounds.

Saunders v. Sheriff of Middlesex (3 Barn. & Ald. 95) was decided on the ground that it was the sheriff's own fault, that the moneys realized by a sale of property of the judgment debtor, had been ordered to be paid to the debtor by a rule of court; that the court would not have made such a rule if the fact had been made known to it, that the sheriff held an execution in favor of the plaintiff, and would have modified the rule on a motion based on affidavit of such a fact.

We are agreed in the opinion, that the plaintiffs cannot maintain this action, by giving the proof offered and rejected, relative to the Toler judgment having been confessed with an intent to defraud creditors.

A more serious difficulty is presented by other undisputed facts appearing in the case. The sheriff has in his hand \$52.24, part of the proceeds of the property levied on while the executions belonging to the plaintiffs were in his hands, to which moneys he makes no personal claim, but which, as his reply states, are to be applied on the Toler execution. Besides the amount necessary to pay for the services for which compensation is specifically prescribed by the statute, he has in his hands the further sum of \$439.76, which he claims the right to retain to his own use, to satisfy certain charges which are enumerated in the complaint.

It is not necessary to discuss the question whether he has a right to retain all or any part of the \$439.76.

If not entitled to retain the whole of it, his position as to the part he is not entitled to retain is the same as to the \$52.24.

He is sued for falsely returning *nulla bona* to the plaintiff's executions. The plaintiff make a *prima facie* case, by showing that he holds moneys which are the proceeds of defendant's property, sold while these executions were in his hands. The

sheriff meets this claim by showing that he received an execution in favor of Toler, against the same debtor, prior to his receipt of those belonging to the plaintiff. If that execution was still in his hands, it would be a *prima facie* defence to this action. But he had returned that *nulla bona* before this action was brought. The defence is simply this: he is not liable to the plaintiff, because he has falsely returned *nulla bona* to a prior execution, when his duty required him, as between the execution creditors, to have applied the surplus on the Toler execution, and to have returned it satisfied *pro tanto*.

Can a sheriff protect himself against such an action, under a prior execution so returned? Is he at liberty to say this return is true, because another return is false, or to protect himself from the consequences of a return apparently false, by showing another return to be actually so?

In *Towne v. Crowder*, 2 Car. and P. 356, Best, Ch. J., held that he could not.

There may be many reasons to justify such a return, notwithstanding the priority of the Toler execution. If the Toler judgment was fraudulent as against the plaintiffs, the sheriff, if he saw fit to do so, was at liberty to return it *nulla bona*, and if sued for a false return, could protect himself by proof of the plaintiff's judgments and executions, and that the judgment in favor of Toler was confessed with intent to hinder, delay, and defraud the creditors of Purdy. (*Shattock v. Carden et al.*, 11 L. & Eq. R. 570; *Pierce v. Jackson*, 6 Mass. 242; *Lovick v. Crowder*, *supra*.)

If the sheriff was notified that the Toler judgment was fraudulent and void as against the plaintiffs, and that they should, on that ground, insist on having the proceeds of the sale applied on their executions, the sheriff, if cognizant of facts which would incontrovertibly establish the fraud, not only had the right, but it was his duty to return the Toler execution unsatisfied. Whatever may be the reason which induced him to so return it, we are satisfied that he cannot defend this action by showing that return to be false.

To justify under a levy by a prior execution, he must either have executed such execution by an application upon it of the proceeds of the property sold, or have it in his hands unre-

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turned. If he has neither executed it, and applied the proceeds of the property upon it, nor has it in his hands, so that he is bound and has authority to execute it, and make such application, but, on the contrary, has returned it *nulla bona*, he is not at liberty to say in such an action, that the return is false, that it was his duty to have applied the money on the execution, against his return, that it was not his duty, and that, therefore, the present plaintiffs are not entitled to recover. On this ground, a new trial must be ordered, with costs to abide the event.

CODDINGTON v. WHITE & MONEYPENNY.

The plaintiff was the owner of a quantity of pig-iron, lying on Pier 37, North River, which the defendants—one as the superintendent of public streets, the other as a dockmaster—gave notice, unless removed on or before the 3d of September then instant, would be taken to the public yard, and there disposed of, as the ordinances of the corporation direct.

On the morning, and early in the afternoon of the 3d September, the defendants caused the iron to be taken to the public yard, and the plaintiff was compelled to pay a considerable sum for charges and expenses, as the condition of its restoration. Had not the iron been taken to the public yard, it would have been removed on the same day by a person to whom the plaintiff had sold it. *Held*, that the notice, by its fair construction, gave to the plaintiff, as owner of the iron, the whole of the 3d of September, to make the removal that was ordered; and that the defendants, by taking it to the public yard, at the time and in the manner they did, rendered themselves liable to him as trespassers.

Held, also, that the defendants, as public officers, were bound to act in conformity to the city ordinances, and to the terms of the notice; and could not defend themselves upon the ground, that, as private citizens, they had a right to remove the iron, as a nuisance.

(Before DUNN, BOSWORTH, and EMMET, J.J.)

October 25. November 19, 1853.

MOTION, on the part of the defendant, for a new trial, upon a case and exceptions.

The action was brought to recover damages for the wrongful and malicious taking and detention by the defendants, of certain personal property belonging to the plaintiff.

The complaint charged that the defendants, on or about the 2d and 3d days of September, 1850, wrongfully took and carried away 96½ tons of pig-iron belonging to the plaintiff, and that the plaintiff was obliged to pay, and did pay, the sum of \$168, to obtain the possession and return of the iron from the defendants, and the further sum of \$75, for the re-cartage and re-weighing of the iron; and that he had sustained other losses and damages in getting back the iron, amounting in the whole to \$500, for which sum judgment was demanded.

The defendants put in the following answer.

The defendants, in answer to the complaint of the plaintiffs in the above entitled action, deny all and singular the allegations and averments in said complaint contained, otherwise than is hereinafter set forth.

And these defendants aver that, by an ordinance of the mayor, aldermen, and commonalty of the city of New York, it is made the duty of the Superintendent of Streets, and he is thereby authorized to order any article or thing whatever, which may encumber or obstruct a street, wharf, or pier in said city, to be removed to the yard occupied by the Superintendent of Public Buildings, or other suitable place. And these defendants aver, that, in conformity with the ordinances of said city, this defendant, White, was appointed Superintendent of Streets in said city, which said office he was holding at and before the time of the alleged taking and detention charged in said complaint: that in the discharge of the duties of his said office, and in conformity with the ordinances aforesaid, he did order said iron to be removed from said pier; and, thereupon, in the failure of the owner thereof to remove the same within the time required by said ordinance, the defendants did remove the same to the public yard, belonging to the mayor, aldermen, and commonalty of the city of New York, situate in Jay street, in said city, as they were in duty bound; this defendant, Money penny, acting therein, under the directions of said defendant, White. And these defendants aver, that, after said iron was removed, as aforesaid, the same was delivered to said plaintiff, upon the payment by said plaintiff of the necessary expenses and charges, as is provided by the ordinances aforesaid; and these defendants further aver, that they

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have proceeded herein, in all respects, according to law and the ordinances aforesaid.

And these defendants further aver, that, on or about the first day of September last, a great quantity of iron was deposited upon the pier, number 37, North River, in the city of New York, said pier being a public highway. That the said iron was permitted by the owner thereof, to remain on said pier for a long space of time, encumbering said pier, and obstructing the passage way on said pier, where vessels are constantly loading and unloading, and where carts are constantly passing and re-passing, and so hindered those who had business with said carts, and vessels, and the public way, that the said iron, placed as aforesaid, became a common nuisance, and it became the right and duty of said defendants to abate said nuisance, and they did thereupon remove said iron to a safe, suitable, and convenient place.

And these defendants aver, that the acts hereinbefore recited, are the same complained of by said plaintiff in said complaint.

The cause was tried before the Chief Justice and a jury, on the 28th April, 1853. The following were the proceedings on the trial.

George B. Benjamin was called as a witness for the plaintiff, who, being sworn, testified:

That he is a forwarding merchant; that he bought a quantity of iron, lying on pier No. 37, North River, of the plaintiff, on the 3d of September, 1852; that he went up to get the iron about 1½ p.m. that day, and had boats sent around there to take it away; that he found ten or fifteen tons left on the pier, and carts loading to cart it away; witness made inquiries of Money-penny, and asked him if that was Mr. Coddington's iron; at first he made no answer; defendant, Money-penny, was there, keeping account of the iron carted away; witness told him he had come to take it away; defendant answered that he was too late, that he was carting it to the corporation yard, that the greater part, some 50 or 60 loads, had already gone.

This was about 2 p.m. then I saw a notice on a post.

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(Counsel produces a notice, which witness says is the same he saw.) The notice is read in evidence as follows:—

“NOTICE.

“Notice is hereby given to the owner or owners of this pig iron, at present encumbering pier 37, North River, foot of Beach street, that, unless the same be removed therefrom, on or before the 3rd instant, it will be taken to the public yard, and there disposed of as the ordinances of the corporation of the city direct.

“By order,

“GEO. WHITE.

“THOMAS MONEYPENNY,

“*Dockmaster, 5th District.*

“Superintendent of the Streets’ Office, }
 “New York, September 2d, 1852.” }

Being cross-examined, witness says:

I purchased the iron about 11 o’clock, on the 3d September; it was on a credit of six months; I took an order for the delivery of the iron; it was a memorandum of sale of the iron; I went to take possession of the iron; plaintiff gave me immediate authority to take the iron; the iron was then in the custody of Moneypenny.

Direct examination resumed—

Did you consummate the bargain by a transfer of the iron? (Defendant’s counsel objected. Objection overruled. Exception taken.)

I did not; the iron was never delivered to me.

Daniel Ostrander was called as a witness for plaintiff, who, being sworn, testified:

That he was in September last a clerk of the plaintiff; that he made a demand of defendant, White, for a quantity of iron, at the request of plaintiff, at White’s office; I showed him this notice (the above notice was produced) and told him that I wished to get from him an order to remove the iron from the corporation yard; White said he had a bill of charges against the owner; I took the bill to plaintiff, who told me to demand the iron, and if I could not get the iron otherwise, to pay under

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protest; I paid White the bill under protest, amounting to \$168.85; the bills were proved, and read in evidence.

“ Office of Superintendent of Streets,
New York, September 7th, 1852.

Lot of Pig Iron from ship ‘Augusta,’

To GEORGE WHITE,

Superintendent of Streets, Dr.

Sept. 4. Cartage 190 loads, at 55 cents, from foot of

Beach street, North River, to Corporation Yard,

Jane street, - - - - - \$104 50

Labor piling in yard, - - - - - 18 75

Storage, four days, at 6 cents per load, - - - 45 60

\$168 85

Received payment,

ROBERT G. WALMSLEY,

For GEORGE WHITE,

Superintendent of Streets.”

“ Lot, No. 14.

“ New York, September 7th, 1852.

“ Received from T. B. Cunningham (Coddington), under protest, one hundred and sixty-eight $\frac{1}{4}$ dollars, for expenses and storage of 190 loads pig iron, at public yard, \$168 $\frac{1}{4}$.

“ ROBERT G. WALMSLEY,

“ For Superintendent of Streets.”

Mr. White said if Mr. Coddington was aggrieved, he must sue the corporation, it made no difference to him, that merchants must look out for their iron; when I showed White said notice, he did not deny his signature in any way; the invoice was about 100 tons; it cost a dollar a load to remove it from corporation yard, and there should have been 100 loads.

Being cross-examined, he said:

George Lee drew away the iron for the plaintiff; I do not know what was paid.

George Lee was called as a witness for plaintiff, and testified:

That he was a cartman in the employ of the plaintiff in September last; that he carted the iron from the corporation yard; I charged a dollar a load; it was re-weighed at the corporation yard.

Peter D. Demarest was called as a witness for plaintiff, was sworn, and testified:

That he was a city weigher; that he weighed the iron at pier 37; that 30 cents per ton is the regular price for weighing iron. The iron was under my charge.

Being cross-examined, he said:

I weighed the iron on or about the 1st of September last, for Poppy & Co.; I commenced weighing it on the 1st of September; it was not then all unloaded; they commenced unloading it on that day; also, weighed some on the 2d and 3d; I was there when it was carted away; I suppose Poppy & Co. were the owners of the iron.

The plaintiff's counsel here rested. The defendants' counsel moved that the complaint be dismissed, on the ground that there was no proof of ownership of the iron in the plaintiff.

The court denied the motion, to which the defendants' counsel excepted.

Defendants' counsel opened the case for the defence, and offered in evidence an ordinance of the mayor, &c., of May 30, 1849. §§ 318 and 321 are as follows.

§ 318. The Superintendent of Streets is hereby authorized, and it is made his duty to order any article or thing whatsoever, which may encumber or obstruct a street, wharf, or pier, to be removed, and if it be not removed within 24 hours thereafter, to order the same to be removed to the yard occupied by the Superintendent of Repairs and Public Buildings, or other suitable place.

§ 321. All articles removed, as provided in § 318, may be redeemed by the owner, upon his paying to Superintendent of Streets, for the use of the corporation, the necessary expenses of removal, together with six cents per day for every cartload thereof, during the time it shall remain unclaimed.

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Other witnesses were then examined on the part of the defendants, but their testimony, as immaterial, having no bearing upon the questions upon which the case was determined, is omitted.

The defendants offered to prove that the iron was a nuisance, in the public way, which evidence the court excluded, to which ruling the defendants excepted.

The court charged the jury, that the defendants had no right to remove the iron before the time fixed in their notice; and directed the jury to assess the damages the plaintiff had sustained; to which defendants' counsel excepted.

The jury returned a verdict for plaintiff, for \$297.08.

The court ordered judgment to be suspended until hearing and decision at general term, with leave to the defendants to move for a new trial on a case or bill of exceptions, to be heard at the general term in the first instance.

R. J. Dillon, for the defendants, now moved for a new trial upon the following grounds.

I. The court erred in denying the motion made by defendants' counsel to dismiss the complaint. 1. The plaintiff brings this action for damages, which he alleges he has sustained by reason of the illegal, wrongful, and malicious taking and detention of personal property belonging to him. This allegation was material, and was controverted by the defendants' answer, and it was therefore incumbent upon the plaintiff to prove it (Code of Procedure, sec. 168). 2. No sufficient proof of ownership was offered.

II. In an action for trespass *de bonis asportatis*, which this resembles, the gist was the possession, actual or constructive, of the plaintiff, at the time; and he must have had, at least, the right to reduce the goods to possession when he pleased (*Smith v. Milles*, 1 Term Rep. 475-80; *Ward v. Macaulay*, 4 Term Rep. 489; *Putnam v. Wiley*, 8 John Rep. 432). 1. The plaintiff, in this case, had neither actual nor constructive possession. 2. He had parted with his right to the possession, by the sale of the iron on the day in question, to the witness,

Benjamin, who had a regular memorandum of the sale, giving him an immediate right to the possession. 3. The rule of law is, that a contract for the sale of goods, where nothing remains to be done by the seller, before making delivery, transfers the right of property, although the price has not been paid, nor the thing delivered (*Olyphant v. Baker*, 5 Denio, 379). 4. In this case, there was no act to be done, on the part of the plaintiff, to consummate the bargain, as regarded the passing of the property—and as the memorandum of sale gave an immediate right of possession to the vendee, both property and possession were out of the plaintiff.

III. The judge erred, in charging the jury, that the defendants had no right to remove the iron before the time fixed in their notice. 1. The ordinance under which the defendants ordered the iron in question to be removed, made it their duty to have the same removed, if it was not removed by the owner, within twenty-four hours after the order had been given for its removal. Provided, then, the notice was actually posted up for twenty-four hours before the removal was commenced by the defendants, the owner cannot complain, and the defendants but discharged their duty. 2. The notice was up in a conspicuous place on the pier, between eight and nine in the morning of the 2d September (see testimony of Wilkins); at nine on the 3d, the defendant, Moneypenny, commenced carting the iron away. More than twenty-four hours had therefore elapsed, from the time of giving the order, till the time of removal. 3. The defendants were authorized to remove the iron, under their notice of 1st September. 4. The defendants can be bound by the notice of 2nd September, only on the ground of estoppel. But the doctrine of estoppel does not apply. The defendants owed no duty to the plaintiff—entered into no contract with him, nor does it appear that the plaintiff relied or acted upon the faith of the notice. He had made no preparation to remove the iron, and clearly was not aware of the notice—so far as appears, it was first seen by the purchaser, Benjamin, at 2 o'clock on 3rd September. There can be no intendment in favor of the plaintiff, because he was violating the law, nor against the defendants, because they were acting in discharge of their duty (Cow. & Hill—Phillips on Evidence,

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3, 367, 375 ; *Welland Canal Co. v. Hathawa*, 1 Greenleaf, sec. 207, 209).

IV. The offer made by the defendants, to prove that the iron was a nuisance in the public way, should have been accepted. 1. Because, if a public nuisance, any individual had a right to abate the same, and he need not aver any special damage to himself (3 Blackstone's Com. p. 4 & 5, N. Y. Chitty's Edition ; *James v. Hayward*, Cro. Charles, p. 184 ; *Houghton v. Butler*, 4 Term R. p. 364 ; *Hart v. Mayor of Albany*, 9 Wend. p. 589, 90, Opinion of Sutherland, J.). 2. Admitting that the doctrine is, that no one but a party aggrieved can remove a public nuisance, the defendants had a right to make the removal. They were the agents of the Corporation of the City of New York, who were the parties aggrieved, and to whom the right to remove nuisances belongs, as an incident to their control and supervisory power over the streets, wharves, and piers of said city.

F. R. Sherman, contra, for the plaintiff.

I. The motion for a nonsuit was properly denied—as there was abundant evidence that plaintiff was owner of the iron.

II. Whether the iron was a nuisance or not was immaterial, for if it was, defendants had no right to remove it to the public yard, without a notice, or order given, as directed by the ordinance (14 Wend. 122).

III. The defendants had no right to remove the iron, on or before the 3rd of September, because their notice or order was a stipulation not to do so, and upon this stipulation the plaintiff acted. A different construction would be a fraud on the plaintiffs (Cowen & Hill's Notes, 200, 202, and authorities there cited ; *Kingsley v. Vernon*, 4 Sand. Sup. C. R. 364).

IV. There should be judgment for the plaintiffs, with costs.

BY THE COURT. EMMET, J.—The clear justice of this case is with the plaintiff, and we should have regretted had we been forced, upon technical grounds, to disturb the verdict ; but we are entirely satisfied that the objections that have been urged, have as little support from authority, as from reason.

The sale to the witness, Benjamin, did not divest the title of the plaintiff, so as to deprive him of the right, as owner, to maintain this action. There was no actual or constructive delivery of the possession of the iron, for the evidence shows that nearly all of it had been removed before Benjamin presented the order which the plaintiff had given him, and, until this order was delivered and executed, it was certainly not the intention of the parties that the sale should be consummated. It was certainly not their intention that Benjamin should be bound by the contract, unless the order should be complied with. It is true that, in many cases, a contract for the sale of goods, operates, without an actual delivery, as an immediate transfer of the title and of the possession, but it will be found upon examination, that all these are cases in which the actual possession, which, by construction of law, vested in the purchaser, remained, with his consent, in the vendor or his agents,—they have, therefore, no application to the case before us. Here the iron was the sole property of the plaintiff when the defendants began to take it away, and it was to him alone that they could be responsible for their wrongful acts.

That the conduct of the defendants in removing the iron at the time, and in the manner they did, was wrongful, and rendered them liable as trespassers, we cannot doubt. The ordinance of the corporation under which the defendant, White, as superintendent of the streets, professed to act, allows to the owner of any article or thing which, as an encumbrance or obstruction, is ordered to be removed, twenty-four hours after the order is given for making the removal; and, until this time has elapsed, and the removal has not been made, the superintendent has no further power to act. Until then, his removal of the property is unauthorized and illegal. There is no evidence before us that any other order was given by the defendants than that contained in the written notice posted up on the wharf, and bearing date on the 2d September, and admitting this notice to be equivalent to the order which the ordinance requires, (which may well be doubted,) by its fair construction, it gave to the owner of the iron the whole of the next day to make the removal; on the morning, however, of the next day, the defendants began the removal, and completed

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it early in the afternoon, and, by thus acting, they violated the terms of their own order, and lost wholly the protection of the ordinance, which they professed to execute.

The defendants cannot be excused on the ground that the iron, as an obstruction on the wharf, was a public nuisance, which, as private citizens, they had a right to remove, and we think the Chief Justice was entirely right in excluding this defence. They were acting, not as private citizens, but as public officers, and, as such, they were bound to act in conformity to the terms of the ordinance of the corporation, and of the notice which they had given. Every unnecessary obstruction on a public wharf is a nuisance, and it is only upon the ground that it is so, that its removal can justly be ordered; but it is not to be supposed that, when the superintendent of the streets has made an order for the removal of the property within a limited time, not less than that allowed by the ordinance, he can strip himself of his official character, and at once abate the nuisance, as a private citizen. Such a construction would make the ordinance a dead letter, and an order given in pursuance of it a trap and a fraud.

It was also justly observed by the counsel for the plaintiff that, admitting that the iron in its actual situation was a nuisance, which, as such, the defendants might have been justified in removing, they certainly had no right to transport the property to the public yard, and exact from the plaintiff the payment of heavy charges, as the condition of its restoration. We agree with the counsel, that these acts were plainly unauthorized, and had the mere removal been lawful, would have sufficed to render the defendants liable as trespassers, *ab initio*.

The jury have given to the plaintiff little more than the amount, with interest, that he was compelled to pay; and these, we think, are the least damages that the plaintiff was entitled to recover. The motion for a new trial is denied, with costs, and judgment must be entered for the plaintiff upon the verdict.

**THE MAYOR, &c., of the City of New York v. PHILIP MABIE
and others.**

In an action for the recovery of rent, reserved in a lease in writing, damages resulting from a subsequent tortious act of the lessor, not amounting to an eviction, nor constituting a breach of any covenant in the lease, could not, before the amendment of the Code, in April, 1852, be recouped or set off by the defendant.

Whether, in actions commenced since April, 1852, damages thus sustained can be made the subject of a counter claim under § 150 of the Code—*Quere!*
Judgment for plaintiffs upon verdict.

(Before DUNN, BOSWORTH, and EMMET, J.J.)
October 26; November 19.

CASE on a verdict for the plaintiff, taken subject to the opinion of the court at general term.

As the questions of law, which the case involves, arose upon the pleadings, it is necessary to state the complaint and answer *in extenso*.

The complaint of the above-named plaintiffs, the Mayor, Aldermen, and Commonalty of the city of New York, shows that they were, at and before the time next hereinafter mentioned, possessed of certain issues and profits arising and accruing from certain wharves in the city of New York, hereinafter mentioned, viz. the right to collect wharfage from such vessels as should lie against or touch at the said wharves; and being so possessed, they, the said plaintiffs, on the twenty-ninth day of April, in the year one thousand eight hundred and fifty, by a certain instrument in writing, bearing date the day and year last aforesaid, one part whereof was duly executed under the common seal of the city of New York, and the other part whereof was duly executed under the hand and seal of the said Philip Mabie, demised and leased to the above-mentioned Philip Mabie, in consideration of certain rents and covenants therein reserved and contained, the right to levy and collect to his, the said Philip Mabie's own use, all the wharfage which should or might arise, accrue, or become due

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between the 1st day of May, A.D. 1850, and the 1st day of May, A.D. 1851, from the use or occupation by vessels of more than five tons burden, of any of the wharves belonging to the said parties of the first part, the said the Mayor, Aldermen, and Commonalty of the city of New York, from and including the easterly side and end of the middle pier at Coenties Slip, or Pier No. 7, to and including the westerly half of Pier No. 8, or the pier on the easterly side of Coenties Slip, together with the bulk-head between said piers, and which were known as district No. 5 of public docks and slips, except certain docks, slips, wharves, piers, and places therein mentioned and excepted.

And the said plaintiffs, the Mayor, Aldermen, and Commonalty of the city of New York, further thereby authorized the said Philip Mabie to demand and receive all lawful sums of money due for wharfage thereon.

And the said Philip Mabie on his part covenanted to pay to the said the Mayor, Aldermen, and Commonalty of the city of New York, the sum of five thousand five hundred dollars, in four equal quarterly payments, on the first days of August, November, February, and May next thereafter.

That the said Philip Mabie, on the said day, in order to secure the payment of the said rent, in and by the said lease, agreed to be paid, duly executed, together with the said Simeon Fitch, and William Fitch, under their respective hands and seals, a joint and several bond, in the penalty of eleven thousand dollars, conditioned for the payment of the rents in said lease, reserved unto the said, the Mayor, Aldermen, and Commonalty of the city of New York, at the times at which they should respectively fall due.

That the said Philip Mabie entered upon the said premises and collected and retained for his own use and benefit and behoof, of the wharfage thereof, under and in pursuance of the said lease for the full term thereof, but has neglected and failed to pay the full amount due to the said the Mayor, Aldermen, and Commonalty of the city of New York, under the said lease, but that there is still due and unpaid for rent thereon, from the said Philip Mabie, the sum of four thousand four hundred and twenty-five dollars, with interest, upon the sum

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of three hundred dollars, from the first day of August, A.D. 1850, upon the sum of thirteen hundred and seventy-five dollars, from the first day of November, A.D. 1850, upon the sum of thirteen hundred and seventy-five dollars, from the first day of February, A.D. 1851, and upon the sum of thirteen hundred and seventy-five dollars, from the first day of May, A.D. 1851.

Wherefore the said plaintiffs demand judgment against the said Philip Mabie as principal, and Simeon Fitch and William Fitch as sureties on the said bond, for the said sum of four thousand four hundred and twenty-five dollars, together with interest on the sum of three hundred dollars, from the first day of August, A.D. 1850; upon thirteen hundred and seventy-five dollars, from the first day of November, A.D. 1850; upon thirteen hundred and seventy-five dollars, from the first day of February, A.D. 1851; and upon thirteen hundred and seventy-five dollars, from the first day of May, A.D. 1851, besides the costs of this action.

The amended answer of the defendants in this action respectfully shows to this court, that they respectively admit the making of the lease, and the giving of the bond, as they are respectively set forth in the complaint in this action. But the said defendants for answer thereto allege and declare that immediately after the said defendant, Mabie, entered upon the collection of the wharfage according to and in pursuance of said lease upon the premises described therein and referred to in said complaint, a certain agent or agents of the plaintiffs unlawfully and without any right or authority whatever, came upon the said premises, and then and there entered upon and actually assumed the entire control of all vessels, so far as relates to the berth or location thereof in said slip, or adjacent to said pier or piers, which came up to or into the district so leased to said Mabie, as described in said complaint, and that they, the said agent or agents of the said plaintiffs did, without any authority or right, or consent from said Mabie, and very greatly to his damage, injury, and loss, then and there, and have ever since, and still continue to let out and give the exclusive use to certain vessels, lines, or classes of vessels, or

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the owners, agents, or consignees thereof, to certain berths or locations in said slips, or contiguous to the pier or piers in said district, thereby prohibiting and preventing all other vessels from occupying and using said berths or locations, whether the same were occupied or not.

That said agent or agents during the period for which rent is claimed under said lease, as was well known to the plaintiffs, were in the constant habit of letting out and giving the exclusive use of berths and locations within the slip and adjacent to the pier or piers contained in said district to certain vessels, or the owners, agents, or consignees thereof, and for such exclusive use, either directly or indirectly, receiving a compensation; and that such agent or agents from time to time would give such exclusive use to those who would pay, or directly or indirectly give the most therefor.

That by reason of the unlawful conduct and interference of the agent or agents of the plaintiffs aforesaid, giving such exclusive use, and in preventing other vessels from occupying such berths or locations, even when vacant, and also by reason of the fact, that should such berths or locations happen to be occupied by any vessel or vessels not enjoying such exclusive use or privilege, and whether loaded or partly loaded, or discharged or partly discharged, or convenient or inconvenient to the captains or owners thereof, and of their being without any right or authority whatever, required by said agent or agents forthwith to haul and remove from said berth or location, the exclusive use of which had been given as aforesaid, other vessels not enjoying such exclusive privileges almost entirely abandoned, and left said district of public docks and ships leased as aforesaid, and obtained accommodations elsewhere, and thus, through the unjust and unlawful interference of the agents of the plaintiffs aforesaid, was the said defendant, Mabie, deprived of a large amount of wharfage which would otherwise have been received by him. That by reason of the unlawful, overbearing, and unjust conduct as aforesaid, of the agent or agents of the said plaintiffs, all of which were well known to them, the said defendant, Mabie, has sustained a very great loss and damage, amounting to more, as he verily believes, than the whole sum claimed in the said complaint.

And the said defendant, further answering, alleges, that the said agent or agents of the said plaintiffs in entering upon, doing and performing all the various acts and matters as hereinbefore mentioned, and each and every of them, acted under the authority, direction, and approval of the said plaintiffs, and that all the doings and conduct of the agents aforesaid, in each and every of the matters aforesaid, were known to, approved of, and ratified by the said plaintiffs.

That the said defendant, Mabie, upon the trial of this action, will seek to have the amount of damages aforesaid sustained as aforesaid, recouped and set off against the amount claimed by the plaintiffs for the excess over and above the amount claimed by them, together with its costs, and that the said complaint, as to the defendants, Fitch, may be discharged with judgment in their favor against the said plaintiffs for their costs.

The reply controverted the allegations in the answer, and denied that the defendants were entitled to recoup or set off the damages which they claimed.

The action was brought on to be tried on the twenty-fifth day of April, 1853, before the Chief Justice and a jury.

The defendants admitted the allegations of the complaint, whereupon they were allowed by the court to open the case.

The defendants then offered to prove the facts set forth in the answer.

The court excluded the evidence, and directed the jury to find a verdict for the plaintiffs.

Whereupon the jury found a verdict for the plaintiffs for the sum of five thousand one hundred and five dollars and fifty-six cents, the amount claimed and interest, to which direction of the judge the counsel for the defendants then and there duly excepted. His honor then directed that the entry of judgment upon the verdict should be suspended until the decision of the general term could be had upon the questions of law involved.

R. J. Dillon, for the plaintiffs, moved for judgment on the verdict upon the following grounds.

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The evidence offered by the defendants was inadmissible—because,

I. It was in contradiction of the allegations in the complaint, which the defendants had admitted.

II. The damages claimed by the defendants for the acts of the plaintiffs, are not a subject of set off, as alleged in the answer. Such damages are not a subject of "recoupment." 1. "Recoupment" is allowable only for the violation of the covenants, agreements, or stipulations on the part of the plaintiffs, contained in the same contract upon which the plaintiffs bring suit. (*Ives v. Van Epps*, 22 Wend. 155; *Whitbeck v. Skinner*, 7 Hill, 56; *Ballerman v. Pierce*, 3 Hill, 174; *Road v. McCullister*, 8 Wend. 109; *Nichol v. Dusenberry*, 2 Comstock, 286.) 2. The facts alleged in the answer constitute a tort, or trespass; having no reference to the contract sued upon, or any obligation therein, on the part of the plaintiffs, but entirely independent and extraneous to it. (Cases supra; *Cram v. Dresser*, 2 Sandford, 125; *Ogilvie v. Hall*, 5 Hill, 52.)

III. The testimony offered does not constitute an eviction. 1. The doctrine of eviction does not apply to an incorporeal hereditament. 2. A trespass is not an eviction. The facts alleged in the answer, do not show that the defendants were deprived of the use or enjoyment of the premises; they simply allege an interference with the mode of enjoyment. (Cases supra; *Hunt v. Cope*, 1 Cowp. 242; *Bennett v. Bittle*, 4 Rawle, 339.)

W. E. Noyes, for the defendants, insisting that the verdict ought to be set aside, and a new trial be granted, argued as follows.

The questions in this case arise upon the following facts.

The plaintiffs being the owners of certain wharves, for a valuable consideration, granted and assigned to these defendants the right to receive and collect such wharfage, as during the continuance of the grant should accrue, or become due from vessels lying at or using such wharves.

That from the time the grant took effect, and during the entire continuance thereof, the plaintiffs, without the defend-

ant's consent, assumed the control of all vessels which came up to and used said wharves, permitting some to use certain parts to the entire exclusion of all others, and arbitrarily compelling many to haul, and others to take their places, to the very great inconvenience of the masters and owners thereof—and thereby almost entirely prevented the use of said wharves by all vessels, except those to which the plaintiffs gave such exclusive privileges. That, in consequence of such interference on the part of the plaintiffs, the defendants have lost wharfage and sustained damage to an amount equal to the consideration agreed to be paid for the grant.

1st. Under this state of facts can the defendants recoup the damages thus sustained? or,

2d. Set them off under the statute by way of a counter claim?

I. That the damages thus sustained can be recouped is evident, because the damages arise from the plaintiffs' violation of the spirit of their own contract. They granted to us the right to collect all wharfage, and then from the date of the lease so conducted themselves, that the defendants only got a small portion of what otherwise would have accrued to them, the same as if they had leased us ten rooms in a house and never permitted us at all to enjoy but five of them, and claimed the whole rent. The consideration of the grant has in a great measure failed from the lessor's own acts, and is therefore a proper subject for recoupment. (*Reab v. M'Alister*, 8 Wend. 109; 4 id. 483; *Ballerman v. Pierce*, 3 Hill, 171; 10 Barb. Sup. Ct. Rep. 55; 4 Sandf. 147.)

II. There is an implied agreement on the part of every lessor as a condition of his receiving rent, that the lessee shall quietly enjoy the rights or privileges granted. (Taylor's Landlord and Tenant, 144, and cases cited; 2d ed. id. § 304, note; 1 Sandf. 260.)

III. If this defence does not come within the doctrine of recoupment, it unquestionably is within §§ 149, 150, of the code of procedure, and can be sustained as a counter claim. (Sub. 1, § 150, Code of Procedure.)

By THE COURT. BOSWORTH, J.—The judge, who presided

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at the trial of this action, precluded the defendants from proving the facts alleged in their answer. Was that decision erroneous? This is the only question presented by the case.

It is alleged that the defendants, by the wrongful acts of the plaintiffs, were deprived of the free and uninterrupted enjoyment of the demised premises. The free and uninterrupted enjoyment of the premises was the consideration of the defendants' agreement to pay the stipulated rent, for the recovery of which this action is brought. The plaintiffs, by their unlawful conduct, have produced a partial failure of the consideration of this agreement. Can this partial failure of consideration, thus occasioned, be shown, in an action to recover the whole stipulated consideration, to reduce the amount to be recovered?

On the part of the plaintiffs, it is not denied that they are liable for damages, assuming that they have done the acts set up in the answer. But it is insisted that such damages could not be recovered in an action *ex contractu*, and that damages resulting from an unauthorized interference of a lessor with his lessee's enjoyment of the demised premises, not amounting to an eviction, is not a ground for recouping damages, in an action to recover the reserved rent. That damages resulting from acts during the term cannot in any case be recouped, unless the defendant could recover them in an action *ex contractu*. That the damages suffered in this case could only be recovered in an action *ex delicto*, and are, therefore, not a proper subject of recoupment.

Cram v. Dresser (2 Sand. S. C. R. 125) is cited by the plaintiff as decisive of this question.

Whether the 150th section of the Code, as amended by the act of April 16th, 1852, would allow such facts to be averred and proved, on the ground that they would constitute a defence falling within its definition of a counter claim, it is not material to inquire. All the pleadings in this action had been interposed some months before the provision in relation to counter claims became a part of the Code.

This case must, therefore, be determined by the law as it was when the action was commenced, and the issues arising in it were joined. It seems to be difficult to distinguish this case

from that of *Cram v. Dresser*. Each is an action by a lessor against his lessee, to recover the rent agreed to be paid for the use of the demised premises. In each case the lessee entered upon the premises, and continued in the actual possession and enjoyment of them during the term.

In each case, the damages sought to be recovered resulted from misconduct of the lessor, subsequent to the commencement of the term, which disturbed the lessee's enjoyment of the premises, and rendered such enjoyment less valuable than it would otherwise have been.

In *Cram v. Dresser*, the mere entry of the lessor was lawful, because authorized by the terms of the lease. The tortious conduct of the lessor after entry is characterized by the court as being "of the same quality as a trespass, although unaccompanied by any force."—Id. 126

In this case, the interference was forcible as well as tortious. There was no covenant in either lease that the lessor would not interfere with, nor disturb the lessee's enjoyment of the premises. This court held in *Cram v. Dresser* that as there was no covenant against any such interference, the damages resulting from it could only be recovered by an action of tort, and could not be recouped.

In *Cram v. Dresser*, the defendant, by a notice annexed to his plea, stated that he would insist on recovering the damages which he had sustained by the improper conduct of the plaintiff, "by way of recoupment of the damages at the trial."

In the case at bar, the defendant, Mabie, in his answer gives notice, that he will insist on having the damages he has sustained recouped, and set off against the damages claimed by the plaintiffs.

In each case, therefore, the defendant sought to recoup the damages which he claimed he had sustained. In each case the defence was attempted to be interposed, on the principle that the doctrine of recouping damages was applicable to the facts of the case. If the evidence is inadmissible, provided it is not a proper case for recoupment, then the case of *Cram v. Dresser* is conclusive upon this court, unless it is prepared to reconsider and overrule it.

In this case there was no express covenant for quiet enjoy-

...e, but is one which the law
the community.

...at the claim or demand of the
contract or transaction, which cre-

It does not arise out of any fraud
the lease, nor out of the breach of
of the plaintiffs, contained in it, or
temporarily with it.

...which might as well have been commit-
the plaintiffs, which was subsequent to
e, and the entry by the defendant upon
thing demised.

...that if a tenant is deprived, by the lessor,
in whole or in part, the obligation to pay
e such obligation has its force only from its
ch is the enjoyment of the thing demised.

...s, p. 145.)

...ful interference by the lessor, with the lessee's
the premises, rendering their use less valuable,
amounting to a technical eviction, deprives him,
ne consideration of his covenant to pay rent, and
resents the case of a partial failure of consideration,
uld operate to reduce the plaintiff's recovery.

...it may be answered, that all the cases in which the
of recoupment has been applied, are those in which
endant failed to ultimately receive a full consideration
ne sum sought to be recovered of him. When sued for
price of property which he was induced to buy by reason
fraudulent misrepresentations as to its quality, by showing
e fraud, he establishes the fact, that he at no time had the
whole of that which constituted the consideration of his pro-
mise to pay the contract price. (*Van Epps v. Harrison*, 5 Hill
63-66.) He was never put in possession of that which he
contracted to buy.

But if the property had been as represented, and subsequent
to its delivery to the defendant, the plaintiffs had tortiously
injured it, or interfered with the defendant's beneficial enjoy-
ment of it, although liable in tort for such conduct, no one, I
think, will pretend that, in an action for the price, such tort

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could be proved and the damages resulting from it be recouped. Yet the tort supposed, would have deprived the defendant, in one sense, of part of the consideration of his promise.

In judgment of law, the cause of action arising from the tort, in such a case, does not spring from the same contract or transaction, as the action upon the promise to pay the stipulated price. It does not spring from the same contract, for that contains no stipulation in respect to the conduct complained of.

In the case at bar, the liability of the plaintiffs to the defendant, upon the facts offered to be proved, would have been precisely the same, if the lease had been given to the defendant, by some other person. I think no case can be found, which allows a tenant to show a tort of the lessor, in bar of an action for the rent reserved, or to reduce the amount of the recovery, unless such tort amounts, in law, to an eviction. That a trespass upon, or tortious interference with, the demised premises, during the term, which merely renders the tenant's enjoyment less valuable, but which cannot be treated as an eviction, and which violates no covenant contained in the lease, cannot be set up as a partial failure of the covenant to pay a fixed rent, or by way of recoupment.

That such conduct on the part of the landlord, is to be redressed in the same way as if it had been the act of a stranger.

That *Oram v. Dresser* was decided in accordance with adjudged cases, and that no well considered case justifies us in extending the doctrine beyond the limits authorized by the previous decisions. (*Reab v. McAllister*, 8 Wend. 109; *Ballerman v. Pierce*, 3 Hill, 171; *Van Epps v. Harrison*, 5 Hill, 63; *King v. Paddock*, 18 L. R. 141; *Nichols v. Dusenbury*, 2 Coms. 286; *Harrington v. Snyder*, 3 Barb. S. C. 281, 6 Barb. S. C. R. 386; *Willoughby v. Coms.*, 3 Hill, 392; *Bushell v. Lechmere*, 1 L. Ray., 369.)

In this case the defendant, Mable, received all the wharfage that actually accrued, during the whole term.

The motion for a new trial must be denied, and a judgment entered in favor of the plaintiffs upon the verdict.

The same judgment will be entered in the other action between the same parties.

GEORGE WEBB, Respondent, v. HENRY GOLDSMITH and LEON
GOLDSMITH, Appellants.

One R. K. C. held notes of the defendants, including the three notes in suit, which were payable to his order, amounting to nearly \$3000, and they being unable to pay their creditors, he made a settlement with them, and accepted from them as a payment in full of all the notes so held by him, the note of a third person for \$500, which was paid at maturity. R. K. C. then for a valuable consideration endorsed the notes in suit without recourse to the plaintiff, who at the time of the endorsement had notice of the settlement with the defendants.

Held, that although the note of a third person so received by R. K. C. was for a much less sum than was then owing to him from the defendants, yet its acceptance by him as a payment in full, rendered the transaction valid as an accord and satisfaction, and that the plaintiff having notice of the facts was bound by the settlement.

Report of a referee in favor of the plaintiff set aside, and new trial ordered.

(Before DUKA, BOSWORTH, and EMMET, J.J.,)

October 27; November 19, 1853.

THIS action was brought by the plaintiff, as endorsee, against the defendants, as makers of three promissory notes, each payable to the order of R. K. Clark, each dated May 1, 1845, two of which were severally for the sum of \$133, one at eight, and the other at ten months, and the third was for \$135, and payable at twelve months.

The answer denied indebtedness on the notes, and averred that the defendants never received any consideration for either of the notes, either from the plaintiff or the payee, and alleged on information and belief, that plaintiff knew when he received the notes, that the plaintiffs were not indebted to Clark, and that the plaintiff paid Clark no consideration for them.

The reply put in issue the new matter contained in the answer, and also stated that the notes were received from Clark, in the course of business, for a valuable consideration, without notice of any equity or set-off against the same in favor of the makers.

The cause was referred to a referee. On the trial, it appeared that the notes were transferred by the payee to the

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plaintiff, on the 30th of April, 1846, without recourse, in satisfaction of notes held by the plaintiff against the payee, and with full notice that there had been previously a settlement of the notes, between the payee and the makers. The settlement between the payee and the makers took place on the 21st of July, 1845.

The payee then held the notes in suit, other notes made by the defendants, and also certain notes received from them, made by third persons. A receipt was given by Clark at the time of the settlement, the operative words of which are as follows:

"Received, New York, July 21st, 1845, from Henry Goldsmith, James M. Smith, Esq.'s note at sixty days, for five hundred dollars, in full for the following notes, leaving it to their honor to pay the balance should they ever become able." The receipt contained a description of the notes, and was signed "R. R. CLARK."

The referee reported in favor of the plaintiff for the full amount of the notes. A motion was made for a new trial on the ground of newly discovered evidence. On the trial, it was doubtful whether any receipt or voucher was given at the time of the settlement. On affidavit of the discovery of it after the trial, a motion was made for a new trial, the motion was denied, with liberty to appeal from such order, and bring the appeal to argument, at the time of arguing an appeal from the judgment entered on the report of the referee. The appeals from the order and the judgment, were submitted on printed points.

P. J. Joachimsen, for the defendants and appellants.

The referee erred in his judgment.

I. The settlement with Clark, by which he took from the defendants a new security (viz. Mr. Smith's note), for the indebtedness of the defendants, including the notes in suit, was a complete satisfaction of all their indebtedness to him.

II. The notes in suit were extinguished, so that from the time of the settlement, Mr. Clark became a holder without

consideration, and only a trustee for the defendants: he was bound, on demand, to surrender these notes to Messrs. Goldsmith.

III. The plaintiff in this suit took these notes, with full and complete knowledge of the compromise; he is not, therefore, an innocent, or *bonâ fide* holder. He took them "without recourse," exchanging Clark's liability to him for Goldsmith's liability, whatever it might be, to Clark; and the bar to Clark's recovering against these defendants, is equally a bar to the plaintiff.

IV. This is certainly so, to all intents and purposes, as to the two notes at eight and ten months' date, which the plaintiff took after maturity. He certainly is affected, as to those two notes, by the equities subsisting between Clark and the defendants. The judgment, therefore, ought to be reversed. The motion for a new trial ought to have been granted. The receipt of Mr. Clark is conclusive evidence of the compromise made by the defendants. This evidence was supposed (on the trial) not to exist. Argument cannot be needed to show its materiality; its non-production at the trial is fully accounted for in the affidavits used on the motion, and which remain wholly uncontradicted; and the motion was made at the earliest practicable period. There is no conflict of testimony in this case; its equity as regards the defendants is too transparent to require any comment. Relying upon that equity, and feeling assured that the whole case upon its merits, irrespective of technicalities or objections (none having been made before the referee), is fully before this just and impartial tribunal, the defendants are warranted in asking, that this court will so mould the case to conform to the facts proven, that we may be relieved from what undoubtedly will be an unjust recovery.

Slosson & Hutchins, for plaintiff, respondent.

I. The referee was correct in ruling that the answer did not deny the making of the notes upon which the action was brought. The answer simply denies that the defendants were indebted to the plaintiff, upon any promissory note or notes

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made by them. This is pleading a conclusion of law, which is bad (*McMurray v. Gifford*, 5 Pr. R. 14). This was the only exception taken on the trial.

II. It is not a case for a new trial, on the ground of newly discovered evidence. 1. The receipt, the discovery of which is made the ground of the application, was in the possession of the defendants at the time of the trial, and they knew it. The affidavit of Henry Goldsmith, one of the defendants, shows this. It is no excuse that Goldsmith did not succeed in his search for it, in time for the trial, for the defendants could have applied to postpone the trial on that account, and should have done so (*Vandervoort v. Columb. Ins. Co.* 2 Caine's R. at p. 163). *Emanuel L. Goldsmith* testified, on the trial, that he was present at the alleged settlement; that he thought there was a release or receipt given, signed by Clark, at the time of the settlement, and he gives his reasons for thinking so; and, from his affidavit, used on this motion, it appears that he was apprised by defendant's counsel that the testimony was material, and that after searching he informed the defendant's counsel, on the morning of the hearing, that he could not find it. *R. K. Clark*, who is alleged to have given the receipt, and who was examined as a witness for the defendant, was not asked a word in respect to such receipt, nor even whether a receipt was given, though the defendants were confident there was one, and had looked for it immediately before the trial. They might have proved by Clark, the contents of such receipt as a lost receipt, if they had deemed it material; but they made no effort to do so. Under these circumstances, this cannot be called newly discovered evidence, nor are the defendants in the position of those against whom laches cannot be imputed. 2. But it is a conclusive answer to this application for a new trial, that the evidence sought to be introduced is immaterial. The evidence must be material, as well as newly discovered. (See case of *Vandervoort v. Columb. Ins. Co.* above cited, 2 Caine's R. p. 165.) The receipt, in itself, proves nothing more than the parol evidence already in—or, if it does, its meaning must be qualified by that evidence, and no objection can be taken to the character of such parol evidence, as varying a written contract (even if the receipt is to be taken

as a contract, which we do not admit) in as much as the evidence was introduced by the defendants themselves. The evidence, then, as it stands, is, "that on payment of the \$500, the defendants were to be released from all indebtedness." (See Smith's testimony.) Now, even admitting that on the evidence, the \$500 here spoken of was represented by Smith's note, referred to in the receipt, though it is not so stated, it is, notwithstanding, manifest that the agreement, if any, was executory, and not to take effect until the note was paid; this is further manifest from the fact, that the notes to be compromised by the payment, were all left in the possession of Clark. The transaction was not completed at the time—by the defendant's permitting Clark to retain the notes, they negatived all idea of taking Smith's note at their own risk—this, under any decided case, would be fatal. The rule of law, as laid down by Justice Sutherland (*Mulden v. Whitlock*, 1 Cowen, p. 306), is this: "No principle of law is better settled than that taking a note, either from one of several joint debtors, or from a third person for a pre-existing debt, is no payment, unless it be expressly agreed to be taken as payment, and at the risk of the creditor—nor does the taking a note, and giving a receipt for so much cash, in full of the original debt, amount to evidence of such express agreement to take the note in payment. The agreement must be clearly and explicitly proved by the original debtor, or he will still be held liable." Under this evidence, as construed by this rule, the referee could not find otherwise than he did; and, were the receipt introduced, it could not vary the case. It is perfectly reconcilable with the parol testimony, and proves no more.

III. The defendants have no equity; by permitting Clark to retain the notes, they enabled him to pass them to innocent parties, and for value.

IV. The notes were originally for value; they were given for cigars, and they were passed to plaintiff for value; he gave up Clark's notes to a considerable amount, and Clark assigned these notes to him, without recourse to him, Clark.

V. One note, at all events, was passed to plaintiff before due, and, in respect to that, there should be a verdict for plaintiff in any event.

D.—II.

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BY THE COURT. BOSWORTH, J.—No objection seems to have been taken before the referee, that the evidence given in the trial, was inadmissible under the pleadings. No such position is taken in the points made by the respondent. The appeal should be determined, as it would be, if the pleadings were incontestably adapted to the facts as proved.

According to the facts proved, while the payee held these notes, and before the maturity of either of them, he accepted of the makers a note made by a third person, falling due before either of the notes in suit, in full payment and satisfaction of these notes. The note so received was paid.

The testimony given at the trial was explicit, that the note against Smith was accepted, "in settlement and discharge of the notes in suit."

The legal import of the receipt signed by Clark is, that he accepted the note against Smith, in satisfaction of the three notes in suit.

The receipt imports, that the defendants had become liable to pay these debts, and declares, that should they become able it was to be left to their honor to determine whether they would pay the same. It states, that the note against Smith is taken, in full, for notes of a larger amount, and it is so transferred and accepted, before either of the notes in question became due.

The acceptance, by the holder, from the maker of a note, of a note made by a third person, though for a less sum, in settlement of it, and in full for it, is a valid accord and satisfaction (*Boyd v. Hitchcock*, 20 J. R. 76; *Le Page v. McCrea*, 1 Wend. 164; *Booth v. Smith*, 3 Wend. 66; *Frisbie v. Larned*, 21 Wend. 450; *Kellogg v. Richards*, 14 Wend. 116).

The notes having been satisfied while in the hands of the payee, the plaintiff, who took them with full notice of all the facts and circumstances, has no equities superior to those of the payee.

On the merits, as the facts now appear, the report of the referee was erroneous.

But the pleadings do not allege a settlement and compromise of the notes. They aver nothing is due on them, but state no facts, from which such a conclusion can be drawn. They aver

that the defendants received no consideration for them. This fact is disproved; for it is proved that they were given for cigars.

The pleadings should be amended. The issues now formed, do not raise the question, whether there was an accord and satisfaction of the notes. If an agreement to abstain from prosecuting a criminal complaint formed part of the consideration of the settlement and compromise, the whole transaction may prove to be void.

The judgment appealed from must be reversed, and the report of the referee set aside, with liberty to the defendants to serve an amended answer in twenty days; the date of the issue to be unchanged.

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A sole *cestui que trust*, who, as such, will be entitled to the whole, or a definite portion of the amount, for the recovery of which the action is brought, is not a competent witness for the plaintiff.

The construction and effect of a policy of insurance made by a company incorporated in Connecticut, are governed by the law of that State.

A wager policy is a valid contract at common law, and it must be presumed, until the contrary is shown, that it is so by the law of Connecticut.

An assignment, or other instrument in writing, to which there is no subscribing witness, when it comes from the possession of the person entitled to its custody, may be read in evidence, upon proof of its being genuine, without proof of its actual execution at the time of its date; this, when no circumstances of suspicion are shown, will be presumed.

The assignee of a policy of insurance upon life, in trust for the wife of the assured, upon his death may maintain an action for the recovery of the sum insured in his own name, as trustee of an express trust. Neither the wife nor the personal representatives of the deceased, are necessary parties.

The assignee for value of a policy of insurance effected by the assignor, upon his own life, is entitled, upon the death of the assignor, to recover the whole amount insured, without reference to the consideration paid by him for the assignment.

Every policy of insurance upon life is valued; that is, the interest meant to be covered, is valued at the sum insured. Judgment for plaintiff, with costs.

(Before DUKER, BOSWORTH, and EMER, J.J.)

October 28; November 19, 1853.

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CASE upon a verdict for the plaintiff, subject to the opinion of the court, at general term.

The action was brought to recover the amount of two policies of insurance upon the life of one Charles Noyes.

The complaint averred that the defendants are a corporation, created by the laws of Connecticut, and that, on or about the 12th of October, 1850, they effected a policy of insurance with one Charles Noyes, numbered 2,500, and dated 11th October, 1850; and executed and delivered the same to Noyes, by which, in consideration of the sum of \$4.22, to them paid, and of the premium of \$19.20, to be paid annually, on the first day of January in each year, they insured the life of Noyes in the amount of \$2,000, for the term of six years and six months, from the 11th October, 1850; and promised to pay the said sum of \$2,000 to the heirs, executors, administrators, or assigns of Noyes, within ninety days after due notice, and proof of, his death.

The complaint then averred, that, on the 20th October, 1850, Noyes, for a valuable consideration, and by an instrument in writing, duly assigned the said policy to the plaintiff, who, on the same day, caused notice of the assignment to be given to the defendants, and an entry thereof to be made in their books.

It then set forth the execution by the defendants, and the delivery to Noyes, of a second policy upon his life, numbered 2,499, of the same tenor and date, for the same amount and for the same term of years, which, it alleged that Noyes, on the 14th of February, 1851, for a valuable consideration, by an instrument in writing, duly assigned to the plaintiff, of which due notice was given to the defendants, and an entry thereof made in their books. It then averred the due payment of premiums, and the performance by Noyes, and the plaintiff as assignee, of all the conditions of the insurance. That Noyes died at New Haven, in Connecticut, on the 12th March, 1851. That, on the 15th of the same month, the plaintiff gave to the defendants due notice and proof of his death. That the defendants, although admitting their liability, had omitted to pay to the plaintiff the sum insured, and demanded judgment for \$4,000, with interest from the 13th June, 1851, besides costs.

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The answer of the defendants denied that due notice and proof had been given of the death of Noyes ; and then set up four separate defences, the two last of which only are necessary to be stated, no evidence having been given on the trial in support of the others.

The fourth separate defence, after denying that the plaintiff gave a valuable consideration for the assignments of the policies, averred, upon information and belief, that he had not, at the time of the death of Noyes, any interest in his life, and had not been injured by his death. The fifth averred that, if the plaintiff ever lent, or advanced any sum whatever on the said policies, he lent or advanced no more than the sum of \$300, and was, therefore, not entitled to recover more than that sum ; and that, if the defendants were liable to pay the sums insured, the personal representatives of Noyes were interested in the claim, and were necessary parties to the action.

The reply takes issue upon the allegations in the first four defences, and, in answer to the fifth, avers, that when Noyes assigned the policies, the plaintiff paid to him the sum of \$300 in cash, and agreed and undertook to pay all the premiums which might thereafter accrue thereon during the periods for which they were issued ; and in case of the death of the said Charles Noyes, to collect the amounts secured to be paid by the said policies of insurance, and, after deducting five hundred dollars to reimburse the said plaintiff for his payments to the said Charles Noyes and otherwise, on account of the said policies of insurance, to pay the balance of the amounts secured to be paid by the said policies of insurance to Elizabeth G. Noyes, then the wife, and now the widow of the said Charles Noyes ; and that no executor, administrator, or other personal representative, of the said Charles Noyes, or any other person, has any claim upon or interest in the amount secured to be paid by the said policies of insurance, or either of them, or is a necessary party to this action ; but that the whole of the amount secured to be paid by the said policies of insurance is due and payable to the said plaintiff, upon his own account, and in trust for the said Elizabeth G. Noyes ; and that the said plaintiff is entitled to receive and recover the same and to judgment, therefore, in this action.

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Upon these pleadings, the cause came on to be tried before Mr. Justice CAMPBELL, and a jury, on the 22nd January, 1853.

Upon the trial, the counsel for the plaintiff put in evidence the two policies, and the assignments thereof, the due execution of all being admitted. The sale and assignment of the policy, 2,499, was stated to be in general terms "for a valuable consideration;" that of policy, 2,500, in consideration of the sum of \$300, paid by the plaintiff to Noyes. It was also proved that the policies in question were issued from the office of an agency of the company in the city of New York, in exchange for a prior policy for \$4,000, which Noyes had previously effected, and then surrendered. That a book of the defendants, lettered on the back, "American Mutual Life Insurance Company—New York Register," was kept in that office, in which entries in columns, properly headed, of all particulars deemed material in relation to the policies issued from the office, were made; and that in that book the following entry, bearing date 11th October, 1850, was made in a column, headed, "For whose benefit," relative to the policy, 2499: "Wife"—the following, relative to policy, 2,500: "Self assigned to M. St. John."

A great deal of testimony was given upon the question whether due notice and proof of the death of Noyes had been given to the defendants, but it is not necessary to be stated, as the defence, upon this ground, was finally abandoned.

Nelson J. Waterbury, a witness on the part of the plaintiff, produced the papers, of which copies are given below, and proved that they were in the handwriting of the plaintiff, and had been put in the hands of the witness by Mrs. Noyes, the widow of the deceased, after the commencement of the suit, but before the reply had been served. The counsel for the defendants objected to their being read, on the grounds that they were the evidence of the plaintiff, and that there was no proof of their existence before the commencement of the suit. The objection was overruled by the court, and the counsel for the defendants excepted.

The papers were then read in evidence in the words and figures following:

"New York, October 30th, 1850.

"In case of the payment to me by the American Mutual Life Insurance Company, of New Haven, Ct., of a policy of insurance, effected by Mr. Charles Noyes, in said company, on his life, for two thousand dollars, and this day assigned to me by said Charles Noyes, I will pay to his wife, Elizabeth G. Noyes, the sum of fifteen hundred dollars.

"MILTON ST. JOHN."

"In case of the decease of Charles Noyes, during the continuance of policy of insurance, No. 2,499, effected on the life of said Charles Noyes, in the office of the American Mutual Life Insurance Company, New Haven, Ct., for two thousand dollars, for the term of six years and six months, from October 11th, 1850, which I promise to keep alive by the payment of such premiums as the said company have a right to demand, and to account faithfully to Mrs. E. G. Noyes, wife of said Charles Noyes, for such sum as may be received by me from said American Mutual Life Insurance Company. New York, February 14th, 1851.

"MILTON ST. JOHN."

Elizabeth G. Noyes, the widow of the deceased, was then offered as a witness on the part of the plaintiff, and was objected to by the counsel for the defendants as incompetent, upon the ground that the action was prosecuted for her immediate benefit. The objection was overruled, and she was examined; but her testimony, as upon the ground of her incompetency it was excluded by the court at general term, is here omitted.

When the case was rested on the part of the plaintiff, the counsel for the defendants made the following points:—1. Noyes assigned one policy for \$300, and the other for a valuable consideration. The plaintiff does not show further consideration or interest in the life of the assignor, and is, therefore, entitled to judgment only for \$300 and interest. 2. The defendant puts in issue the consideration of the assignment, and the plaintiff is bound to prove that Noyes assigned to the plaintiff for \$500, and the balance in trust for his wife. 3. The widow

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is the administratrix of the deceased, and the title is in her, and she should be a party to this action. 4. The plaintiff cannot recover interest unless he proves the law of Connecticut regulating interest. 5. Otherwise, the Connecticut rule of interest, which is six per cent., must be applied.

The court overruled the points, and the counsel for the defendants excepted.

Under the direction of the court, by consent, the jury returned a verdict for the plaintiff, for four thousand four hundred and sixty-one dollars and ninety-eight cents, subject to the opinion of the court, on a case to be made, containing the objections of each party, and subject to liquidation, with leave to each party to turn the case into a bill of exceptions; the case to be heard in the first instance, at the general term, without additional security.

J. Blunt, for the plaintiff, made and argued the following points.

I. There was no fraud set up or proved, or attempted to be proved, in procuring the execution of the policies.

II. Charles Noyes, the assured, had an indefinite interest in his own life, and might insure to any amount the company would agree to, and the insurance was valid so long as he held it undisposed of, for the benefit of his representation. It is only when one person insures the life of another, that the question of interest in the life can arise. (Reynolds on Life Ins., pp. 24, 27.) The policies in question were unquestionably good and valid in the hands of the assured, and in case of his death without assignment, would have been so in the hands of his executor or administrator.

III. The policies being good and valid in the hands of the assured, were assignable like any other chose in action. The stipulation in the policy runs to the assigns of the assured, and to restrict its assignability would, therefore, be a violation of the express terms of the instrument. The equitable interest in a policy is assignable by the common law, and under the Code, the privity of contract and right of action vests in the assignee. (Blaney on Life Ass., p. 75; Reynolds on Life Ins., 151 to 153;

1 How. 390; *Godsall v. Webb*, 2 Keene Ch. Rep. 99; Code, § 111.) The obligor is protected by the assignment in paying to the assignee, if the assignment be not a forgery. He is not at liberty to set up a want of consideration as between the assignor and assignee. The consideration expressed on the face of the assignment is enough for his purposes. And if it were otherwise, a counter obligation, such as the declaration of trust on the part of the assignee, and the money due to him, would be a sufficient consideration.

IV. The wife has an insurable interest in the life of her husband. This right exists at the common law, independent of the statute of 1840. (*Read v. Royal Exchange Assurance Co.*, Peake's Additional Cases, p. 70.) The statute of New York, above referred to, is not regarded as extending the right of effecting insurance, but merely as doing away with proof of the pecuniary interest in the assurances authorized by it. (Reynolds on Life Insurance, pp. 52, 53.) And it gives her the additional right of insuring in the name of any other person as her trustee. Had, therefore, the policies in question been original policies, taken by the plaintiff in his own name, for the use and benefit of the wife, they would have been valid, and it is insisted that the equity of the statute extends to policies effected by the husband, and assigned to another person as her trustee—a *fortiori*, the insurable interest of the wife in the life of her husband, constitutes a good consideration for an assignment of the policies effected by him. A creditor may insure the life of his debtor, or may take an assignment of the policy effected by the debtor on his own life for security of his debt. In the former case, if the debt be paid, the policy becomes void—but in the latter case it reverts to the representatives of the assured. (Ellis on Life and Fire Insurance, pp. 124, 5, 6; *Godsall and others v. Boldero*, 9 E. 72; Reynolds on Life Insurance, pp. 54, 155.) In the present case, therefore, if the wife had no insurable interest, and if the assignment did not bring her within the equity of the statute, and the declarations of trust to be utterly null and void, all of which we deny, yet nevertheless, the full amount insured is recoverable by the plaintiff, for the benefit of the representatives of the insured, all beyond the amount intended to be secured for himself.

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V. But the husband may insure his own life in his own name, and assign the policy for the benefit of his wife. (*Ubi supra.*) There is nothing in such an insurance or assignment in the nature of a gambling transaction or against public policy. On the contrary, it was the original and legitimate purpose of life insurance to provide for the widows and orphans on the death of those on whose exertions while living they depended for support. (Reynolds on Life Insurance, chap. 1; Ellis on Life and Fire Insurance, p. 99, part 2d, chap. 1, sec. 2.) Independent of the Stat. 14, Geo. 3, ch. 8, a wagering policy is void as against public policy (*Lord v. Dall*, 12 Mass. Rep. 115); but no policy for the benefit of the widow or orphan of the life insured has ever been held invalid. That the equitable interest of any valid chose in action may be assigned *ad libitum*, when the rights of creditors are not interfered with, is a principle of so universal application, as not to need support by reference to authorities.

VI. The assignment in the present case was for the benefit of the widow personally, not for the personal estate of the assured. As administratrix, therefore, she had no title or interest, and was not a proper party to the suit. Whether the widow or the creditors are entitled to the fund when collected, is a question between themselves, with which the defendants have nothing to do. It is believed to be easy to maintain, at the proper time, that the creditors have no right in law or equity to moneys which were never the property of the debtor. A creditor cannot compel his debtor to devote his current earnings, necessary for the comfortable support of himself and family, to the payment of his debt. And if, by partial sacrifices of comfort and convenience in his lifetime, the debtor devotes a small portion of his current earnings to secure to his widow a support after his death, by way of insurance on his life, the creditor is not defrauded, and has no right to complain. It is on the debtor's property, not on his anticipated future earnings, that the credit is supposed in law to be given.

VII. Interest is recoverable on default of payment of the insurance money at the time stipulated. (*Van Rensselaer v. Jewett*, 2 Comst. 135; Reynolds on Life Insurance, pp. 165, 6, 7, 8.)

VIII. The rate of interest is regulated by *Lex loci contractus*, which in the present case was clearly within the State of New York.

C. O'Connor, for the defendant, *contra*.

I. Elizabeth G. Noyes, the widow of the assured, was the party solely interested in the suit on the policy No. 2,499; and the suit on the other policy was, in part, prosecuted for her immediate benefit. She was, therefore, an incompetent witness. (Code, §§ 398, 399—Voorhies' Ed., 1853.)

II. Even if the facts testified to by Mrs. Noyes were supplied in the testimony of Mr. Waterbury, the verdict should be set aside. But inasmuch as the papers are written by the plaintiff himself, and were first brought to light after answer filed, Mr. Waterbury's testimony was insufficient to make them evidence in the cause. (*Walter v. Cronly*, 14 Wend. 67; *Farmers' and Manuf. Bank v. Whitfield*, 24 Wend. 429.)

III. In the absence of any sufficient evidence of a trust for Mrs. Noyes, the whole interest in policy 2,499, and the chief interest in the other policy, were in the personal representative of Charles Noyes. She should have sued alone on the former, and should have been a co-plaintiff in the suit of the latter. (Code, §§ 111, 113—Voorhies' Ed., 1853.)

IV. The contracts were made in Connecticut, by a corporation created under the laws of, and locally situated in Connecticut; and, consequently, the law of Connecticut must govern the case.

V. Interest is not recoverable at the common law. It is a subject of statute regulation; and no statute of Connecticut having been proved, the plaintiff was not entitled to recover interest.

At the close of the argument it was admitted that the legal rate of interest in Connecticut was 6 per cent. per annum.

By THE COURT. DUEB, J.—We are entirely satisfied that the testimony of Mrs. Noyes ought not to have been admitted. Although not a party on the record, she was a party in interest,

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and under the construction which we have heretofore given to § 399 of the Code, was incompetent, as a person "for whose immediate benefit the suit was prosecuted." (*Catlin v. Hansen*, 1 Duer Sup. C. R., p. 310.) She was a sole *cestui que trust*, having an immediate right, if not to the whole, yet to a definite portion (\$3,500) of the sum that was sought to be recovered.

But although she was improperly admitted as a witness, it by no means follows that, for this reason, there must be a new trial. The verdict was taken by consent, subject to the opinion of the court upon the whole case; and if, rejecting her testimony, there is sufficient evidence to sustain it, the plaintiff must still be entitled to our judgment. If we strike out her testimony entirely, as we must do, if this case shall be turned into a bill of exceptions, we are clearly of the opinion, that, upon the proofs that remain, the plaintiff was entitled to a verdict, and that it was the duty of the judge, who tried the cause, so to have charged the jury.

We exceedingly doubt whether any evidence of the right of the plaintiff to maintain the action in his own name was necessary to be given, other than the assignments endorsed upon the policies. The argument on the part of the defendants was, that the interest on which the insurances were originally founded, that of Charles Noyes, the assured, in his own life, was certainly extinguished by his assignment of the policies, which, consequently, from that time, became void, as merely wager policies, unless the plaintiff had himself an insurable interest, which was sufficient in law to sustain them. It was conceded, that if the plaintiff had such an interest in the life of Noyes as would have enabled him to make the insurance in his own name, and for his own benefit, he might, for the protection of his interest, well become the owner of the subsisting policies by virtue of an assignment, and as such assignee be entitled to maintain an action in his own name for the recovery of the loss. It was the existence of such an interest that was alone denied.

It is manifest that the objection rests wholly on the assumption that a wager policy is illegal and void. Such, undoubtedly, is now the law in this State, by force of certain new provisions in

the Revised Statutes (1 R. S., p. 662, §§ 8, 10), and such is also the law in England, by force of a special act "for regulating insurance upon lives," which by express words prohibits such insurances, "except when the persons insuring have an interest in the life or death of the person insured" (14 Geo. III., c. 48). There is, however, no evidence before us that such is, or ever has been, the law in Connecticut; and in this State, as well as in England, it has been frequently decided, that at common law a wager policy, as a contract, is just as binding upon the insurer, as a policy upon interest. As the case now stands, we do not know that we have any right to say, that in this respect the rules of the common law have been altered in Connecticut; and it is by the law of Connecticut that the legal construction and effect of the policies in suit are exclusively governed.

This was admitted, and indeed insisted on, by the counsel for the defendants upon the argument, and is not at all doubted by ourselves.

It is not necessary, however, nor do we deem it expedient, to place our decision upon this ground. In delivering our judgment, we shall assume that when the insurance is upon the life of a third person, an insurable interest in the person for whose benefit the policy was effected, or is held, is just as necessary to be proved by the law of Connecticut, in order to warrant the recovery of a loss, as by the law of this State.

The plaintiff claims to recover, partly on his own account, but chiefly as the trustee of the widow of the deceased, and the question of his right to maintain the action, as such trustee, will be first considered.

That a wife has an insurable interest in the life of her husband is quite certain. It is not denied, and it is needless to cite authorities to prove, that a policy effected by him upon his own life, for her benefit, is a valid contract, nor that a subsisting policy upon his own life, held by him, may be assigned to a trustee for her benefit. In both these cases, if the husband die during the term covered by the policy, the sum insured, in law, or in equity, belongs to the wife, and may be recovered by a suit, either in her own name, or where the trust is express, in that of her trustee. None of these positions are disputed.

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The only questions that have been raised on this branch of the case relate to the sufficiency of the evidence to prove the interest of Mrs. Noyes, and the right of the plaintiff to maintain the action as her trustee, and if the declarations of trust executed by him were properly admitted in evidence, it is not denied, that these questions are determined, and his right to a judgment for the whole amount, which the trust as declared embraces, fully established.

Of the interest of Mrs. Noyes in one of the policies, No. 2,499, there is conclusive proof, independent of the declaration of trust in relation to it. It appears by an entry in the registry of the company, made at the time this policy was issued, that the insurance was effected by her husband for her benefit. She was, therefore, the equitable owner of this policy as soon as it was issued, and it was delivered to the husband, and held by him, merely, as her trustee. It is manifest, however, that upon this proof alone the plaintiff would not be entitled to recover. On the contrary, as showing Mrs. Noyes to be the real party in interest, she would be a necessary party to the action. Her interest in the other policy is shown only by the declaration of trust which relates to it, and both the declarations were necessary to be proved to show the title of the plaintiff to prosecute the suit alone, as trustee of an express trust.

In our opinion, all the proof of the due execution of these important papers, which the law requires, was given, and this proof, which uncontradicted, was conclusive.

The testimony of Mr. Waterbury is positive, that both the papers are in the handwriting of the plaintiff, and that they came into his possession from the hands of Mrs. Noyes, although not delivered to him until after the commencement of the suit. As there was no subscribing witness to either of the papers, this evidence was sufficient to prove them to be genuine, and proof that they were so, was all that, in the first instance, could be justly demanded. It was enough to authorize them to be read in evidence.

Upon the trial the counsel for the defendants objected to their reception as evidence, upon the grounds, first, that they were the evidence of the plaintiff, and second, that there was no evidence of their existence previous to the commencement of the

suit. We are persuaded that neither of the objections is tenable. The first, which we find it difficult to understand, was, in effect, abandoned upon the argument before us. If the meaning is, that these declarations of trust were made by the plaintiff with a view to his own benefit, and therefore to be rejected on the same ground as the oral declarations of a party in his own favor, the truth is directly the reverse. His title to both the policies, upon the face of the assignments made to him, was unqualified and absolute, while the effect of the declaration of trust was to show, that nearly the whole beneficial interest was vested in another. The papers were not his evidence, in the sense of the objection, but the evidence of the *cestui que trust*. Mrs. Noyes, who, as the person for whose immediate benefit the suit was prosecuted, had the right to insist upon their production. Another short answer to the objection is, that in all cases, where the suit is brought by the trustee of an express trust, his declaration of the trust, whether oral or written, is necessary to be proved in order to maintain the action, and hence to reject the evidence is, in effect, to hold that such an action cannot be maintained at all. Such a decision would be a virtual repeal of the provision in the Code by which the action is given.

To the second objection, that there was no evidence that the declarations of trust were in existence previous to the commencement of the suit, the reply is, that no such evidence was necessary to be given; nor, judging from our own experience, and the uniform practice in this court, can we believe that, in similar cases, such evidence has ever been required. The rule, we apprehend, to be well established that, when an instrument in writing, to which there is no subscribing witness, is shown to have come from the possession of the party who, according to its terms, has a right to the custody, nothing more is required to be proved, to entitle it to be read in evidence, than the handwriting of the person by whom it purports to have been executed. It is then presumed, that the execution and delivery of the instrument corresponded in time with its actual date, and although this presumption may be repelled by opposite evidence, unless so repelled, it is conclusive.

The declarations of trust, in this case, were the proper evi-

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dence of the title of Mrs. Noyes, as the *cestui que trust*. She was therefore entitled to their possession, and the circumstance that they were not delivered by her to Mr. Waterbury, until after the commencement of this suit, was too unimportant to justify a suspicion of an execution and delivery subsequent to their date. We have found nothing in the cases to which we were referred in the argument, at all inconsistent with the views that we have expressed. In the first of these cases, *Walton v. Crowley* (14 Wendell, 67), it is expressly stated, that the paper which was excluded, was executed during the trial. The bearing of the second case, *Farmers' and Mechanics' Bank v. Whinfield* (24 Wend. 420), upon the question we are considering, has escaped our discovery.

The declarations of trust being properly in evidence, the necessary consequences are, that the plaintiff, as trustee of an express trust, was entitled to bring the action in his own name, and is entitled to recover for Mrs. Noyes, as the *cestui que trust*, the whole sum which, by the terms of the declarations, he agreed to pay her when received from the defendants—that is, the full sum insured by policy 2,499, and \$1,500 of the \$2,000 covered by the other policy. The only question, therefore, that remains is, whether he is not also entitled to recover, for his own benefit, the balance of \$500, claimed to be due on the last mentioned policy ; and, that he is so entitled, we have no difficulty in holding.

It is a mistake to suppose, that the assignment of a policy upon life, varies in any respect the nature of the original contract, or can operate to discharge the insurer from any part of the obligation, which the terms of the contract impose. By the terms of this policy, the defendant agreed to pay the sum insured to the executors, administrators, or assigns of the assured, within a certain time, after due notice and proof of his death ; and we apprehend, that where such notice and proof have been given, and the assignment is valid as between the parties, the right of an assignee to demand and enforce the stipulated payment, is no more liable to doubt or dispute, than that of an executor or administrator.

The objection to the recovery in this case, assumes, and such was the argument, that there can be no absolute sale of a sub-

sisting policy, and that its assignment is only valid, when made as a collateral security for an antecedent debt ; but as we understand the law, a written promise to pay a sum of money is just as properly a subject of transfer for value, where it depends upon a condition, as where it is absolute, and we can, therefore, make no distinction between the rights of a *bona fide* assignee of a policy, and those of an assignee of a mortgage. This seemed to us, upon the argument, very clear upon principle, and we have since found that it is equally so upon authority. The case of *Ashley v. Ashley* (3 Simons, 140), which was not referred to upon the argument, and which Chancellor Kent cites and approves (3 Kent's Com. 370, note), is a positive decision, upon the exact question, in correspondence with the views we have expressed.

In this case, the sum insured upon the life of the person effecting the policy, was £1,000 sterling. He assigned the policy for a small, but valuable consideration, to one Heath, whose executors sold the policy to General Ashley, for £320. Ashley also died ; and, in a suit in equity, between his widow and his executors, an order was made that the policy should be sold by a master, for the benefit of the estate. It was sold accordingly ; but the purchaser refusing to accept the title offered, the case was before the court upon a petition to compel him. The objections to the title urged by his counsel were, that the assignment, to the first assignee being for a consideration so trifling as to be merely nominal, was wholly void ; or, if valid, that the purchaser, instead of the full sum insured, would only be entitled to recover the amount paid by the assignee. The Vice-Chancellor overruled the objections, holding that the provision in the Act of Parliament, prohibiting insurances by persons having no interest in the life insured, had no application to the assignment of a subsisting policy, but that the assignee in good faith, of a policy upon life, which was good when effected, is entitled, in all cases, to demand payment of the whole sum insured.

This case, therefore, proves not only that the absolute sale of a life policy does not affect the validity of the contract, but that the assignee, for value, in the event of the death of the assured, is entitled to the same remedies as his personal repre-

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sentatives, when the title to the policy is unchanged. It thus furnishes a full answer to the argument, that the recovery of the plaintiff upon his own account, if he is permitted to recover at all, ought to be limited to the sum which he advanced. Had there been no trust, he would have been entitled to recover for his own benefit, without any deduction, the sum insured. It is further to be observed, that an insurance upon life, in the language of Mr. Justice Park, from its nature, admits no distinction between total and partial losses; but, when a loss happens, binds the insurer to pay, according to the terms of his agreement, the full sum insured (2 Park on Insurance, Hildyard ed. p. 493). In other words, the interest of the assured, in every such policy, is valued at the sum insured, and by this valuation, as in a marine policy, both the parties are bound. Hence, it has never been doubted, that a person may insure his own life in as many policies, and for any amount he may deem proper, so as to entitle his representatives to recover the full sum insured in each policy, without any other proof of their loss than that of his death. The contract is still a contract of indemnity, but the only measure of the indemnity promised, is that which the policy furnishes.

It is true that in England, a creditor, who insures the life of his debtor, can recover no more than the amount of his debt, whatever may be the sum insured; but this exception to the general rule is created by a special provision in the Act of Parliament, to which we have before referred, and is, as we have seen, not construed to extend to the assignment of a policy effected by the debtor (14 Geo. III. cap. 48, *Ashley v. Ashley*). There must be judgment for the plaintiff upon the verdict; but the rate of interest being governed by the law of Connecticut, must be reduced to six per cent.

Judgment accordingly.

CATHARINE HOLSMAN and others v. BELLA ABRAMS.

Where a lease for a term of years contains a covenant on the part of the landlord, that at the expiration of the term the tenant shall be paid the appraised value of a dwelling-house to be erected by him on the demised premises, or that a new lease for the same term of years, at an appraised rent, (excluding from the appraisement the value of the dwelling-house) shall be granted to him; the tenant at the expiration of the term is entitled to retain the possession until the covenant shall be performed by the landlord or his representatives.

But the tenant so retaining the possession is not discharged from the payment of rent, but is subject to the general rule, that a tenant holding over after the expiration of his lease, with the consent of the landlord, becomes a tenant from year to year, subject to all the terms and conditions of the original lease.

The landlord, however, is equally bound by the same rule, and therefore in an action for use and occupation, can recover no more than the rent originally reserved. He is not entitled to an increased rent proportioned to the increased value of the premises.

The decision of the Supreme Court in *Abel v. Radcliff*, 15 John. 505, is not applicable when the improvements made by a tenant during his term at its expiration belong to him, and not to his landlord. That case is, moreover, of doubtful authority.

Verdict for plaintiffs reduced to rent reserved in the original lease, and judgment thereon, with costs.

(Before DUNK, BOSWORTH, and EMMET, J.J.)

October 19; December 24, 1853.

CASE upon a verdict for plaintiffs taken subject to the opinion of the court at general term.

The action was for the recovery of the value of the use and occupation of premises known as No. 20 Wooster street, in the city of New York, and came on for trial before Mr. Justice Paine, and a jury, on the nineteenth day of April, A. D. 1852, and terminated on that day.

The complaint was in the usual form. The answer denied the tenancy.

To sustain the issue on the part of the plaintiffs, their counsel called

Mordecai L. Marsh, who, being duly sworn, testified in substance, as follows:

I know the defendant Bella Abrams; I reside at No. 22

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Wooster street, in the city of New York, and the defendant at No. 20 Wooster street, adjoining my house. I have known Mrs. Abrams for twelve or fifteen years past, during which time she has occupied No. 20 Wooster street; she occupied those premises from the 1st May, 1847, to the 1st November, 1849. In my estimation, a fair rent for the use and occupation of those premises, per annum, would be five hundred dollars; for the ground, irrespective of the buildings, from two hundred and ten to two hundred and twenty dollars, in that neighborhood; I pay two hundred and ten dollars, per annum; the premises in question are nearer Canal street than mine, and are in that respect more favorably situated than mine.

On a cross-examination by defendant's counsel, witness further testified :

I don't know how the defendant occupied the premises twelve or fifteen years ago; don't know under whom the Abrams family occupied; some of the family bought of Andrew Lockwood : a Mr. Smith built the house.

Ezra P. Davis, another witness produced on behalf of the plaintiffs, being duly sworn, testified as follows :

I know the defendant Bella Abrams; I know the premises No. 20 Wooster street; I was an appraiser of the premises in question some six or seven years ago—appointed by the owner of the lot; we estimated the lot to be worth three thousand two hundred and fifty dollars, and the ground rent of the premises was to be estimated at seven per cent. upon such appraised value.

The counsel for the defendant here objected, that the matter testified of was in writing, and thereupon produced, upon call of the plaintiffs' counsel, an agreement made between Nicholas Dean, guardian, and Bella Abrams, dated 12th January, 1845; also the appraisement by A. Lockwood and Ezra P. Davis, dated 14th February, 1846.

The counsel for the plaintiffs thereupon took said papers, and read them in evidence to the court and jury.

“HOUSE AND LOT No. 20 Wooster street—Lot 25 feet front and rear, and 100 feet deep.

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"It is agreed by and between the undersigned, that Ezra P. Davis, of the city of New York, real estate agent, and Andrew Lockwood, of the same city, builder, value the lot of ground in Wooster street, known as No. 20, of which the dimensions are above given, and also the brick house standing thereon; and that the said appraisers make report in writing, under their hands and seals, of the sum at which the said lot and the said house respectively shall be so valued by them; and should the said appraisers disagree in the valuations about to be made, or either of them, they are hereby authorized to call in the service of a third person as umpire, and the report of any two of them shall be considered conclusive between us,—and thereupon the guardian of the infant children, owners of said lot, will, at his option, either grant a new lease for twenty-one years of said lot, at a ground rent equal to seven per cent. per annum on the sum at which the said lot shall be so valued, or otherwise will pay the full sum at which such appraisers shall estimate the house standing on the front of the lot.

"These proceedings being had in pursuance of covenants for that purpose, contained in a certain lease made of the same ground, by George Lorillard, late of the city of New York, deceased, to Ebenezer Smith, of the same city, bearing date the 17th day of January, 1825, which lease will expire on the first day of May next.

"In witness whereof, the parties now interested in the said lease, have hereunto signed their names this 12th January, 1845.

"Bella Abrams,

"N. Dean,

"Guardian for infant children of D. Holsman, dec'd."

"New York, 14th February, 1846.

"We, the subscribers, have examined the house and lot No. 20 Wooster street, and do estimate the said lot to be worth the sum of thirty-two hundred and fifty dollars, and the dwelling-house standing thereon to be worth the sum of twenty-five hundred dollars.

"A. Lockwood,

"Ezra P. Davis.

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" Lot,	-	\$3250
" House,	-	2500

\$5750

" Fees \$10—one-half to be paid by each party."

The variance in the year, stated in the agreement and the appraisement, is admitted to be a clerical mistake.

The defendant's counsel admitted, that the plaintiff Catharine Holsman, is the widow of Daniel Holsman, deceased, and that Catharine Ann Barclay, Margaretta L. Barclay, Daniel Holsman, Maria M. C. Holsman, Eliza B. Holsman and Julia Holsman, the other plaintiffs, are the children and heirs at law of Daniel Holsman, deceased, and that Clement B. Barclay and James Barclay intermarried with two of the daughters before the commencement of this action, and after said appraisement; that the said children, at the time of the appraisement, were all under age; and that Daniel Holsman was deceased at the time the agreement was entered into between Nicholas Dean, guardian, and the defendant.

The defendant's counsel also admitted, that he (Charles W. Sandford, Esq.) on behalf of the defendant, paid to Nicholas Dean, the guardian of said infant children, the sum of two hundred and twenty-seven dollars and fifty cents, for the ground rent of the premises in question, for the year beginning on the first day of May, 1846, and ending on the first day of May, 1847, with the understanding, that such payment should not prejudice the rights of the defendant to a new lease, or the payment for her buildings; also, that upon the partition of the estate of George Lorillard, deceased, the lot in question was set apart to Daniel Holsman, one of his heirs, subject to the lease held by the defendant.

The lease was here produced by the counsel for the defendant, and handed to the counsel for the plaintiffs. It was thereupon read in evidence, as follows.

"THIS INDENTURE, made the seventeenth day of January, in the year of our Lord one thousand eight hundred and twenty-five, between George Lorillard, of the city of New York,

tobacco manufacturer, of the first part, and Ebenezer Smith, of said city, builder, of the second part, witnesseth, that the said party of the first part, for and in consideration of the rents, covenants, and agreements hereinafter mentioned, &c., conveys all those two certain lots of ground, situate in the Eighth Ward of the city of New York, known and distinguished on A. Hammond's map, as lots numbers one hundred and fifty-seven (157) and one hundred and fifty-eight (158), containing in breadth, in front and rear, fifty feet, and in length on each side, one hundred feet, made by Daniel Ewen, in the month of February, in the year 1821. To have and to hold the said above mentioned and described premises, with the appurtenances, unto the said party of the second part, his executors, administrators, and assigns, from the first day of May, one thousand eight hundred and twenty-five, for and during, until the full end and term of twenty-one years, thence next ensuing, and fully to be completed and ended, yielding and paying therefor, unto the said party of the first part, his heirs or assigns, yearly and every year, during the said term hereby granted, the yearly rent, or sum of one hundred and twenty dollars, lawful money of the United States of America, in equal quarter yearly payments, to wit, on the first days of August, November, February, and May, in each and every of said years; (then follows a covenant for re-entry, and a covenant to pay rent, and taxes, and assessments) and that on the last day of said term, or other sooner determination of the estate hereby granted, the said party of the second part, his executors, administrators, or assigns, shall or will peaceably and quietly leave, surrender, and yield up unto the said party of the first part, his heirs, or assigns, all and singular the said demised premises, (then follows a covenant for quiet enjoyment.) And it is mutually covenanted and agreed by and between the said parties respectively, for themselves severally, and for their several respective heirs, executors, administrators, and assigns, by these presents, that all such front dwelling-houses having brick fronts, or being entirely composed of brick, as shall be erected and made with new materials upon said lots of ground hereby demised by the said party of the second part, his executors, ad

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ministrators, or assigns, and remaining thereon at the expiration of the said term hereby granted, and also the said demised lots of ground shall then be valued and appraised by indifferent persons, one of whom shall be chosen for that purpose by the said party of the first part, or his legal representatives, and one other to be chosen by the said party of the second part, or his legal representatives, and if the said two persons so chosen shall not agree in opinion respecting the premises, then such two persons shall nominate a third indifferent person, and that such three persons so chosen, or any two of them, shall make such, their valuations or appraisements, of the said premises in writing, under their hands and seals, and that thereupon the said party of the first part, his heirs, or assigns, shall and will, at his and their election, either pay to the said party of the second part, his executors, administrators, or assigns, the full sum of money at which such dwelling-houses shall be so valued at; or otherwise shall and will grant to the said party of the second part, his executors, administrators, or assigns, a further lease of said demised premises for the further term of twenty-one years, from the expiration of said term hereby granted, and that the yearly rent to be reserved in such further lease so to be granted, shall be such sum as would be produced by the sum the said lots shall be valued at, put at interest at the rate of seven per cent. per year, in which said further lease the said party of the second part, or his legal representatives, shall be bound to pay all such taxes and assessments, both ordinary and extraordinary, as shall be charged or assessed on the said demised premises during such new lease, at his and own proper cost. In witness whereof the said parties to these presents, have hereunto interchangeably set their hands and seals the day and year first above written.

"[L. s.]

GEORGE LORILLARD,

"[L. s.]

EBENEZER SMITH.

"Signed, sealed, and delivered in the presence of

"JACOB F. HAGADORN."

It was admitted that this lease was assigned to Bella Abrams, 1st December, 1840.

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The defendant's counsel admitted that there was an error in the amount of rental, and that it should be one hundred and twenty-five dollars, instead of one hundred and twenty.

The plaintiffs here rested.

The counsel for the defendant, to sustain the issue on her part, took the stand as a witness.

Charles W. Sandford, being duly sworn, deposed as follows :—

After the appraisalment was made, and about the first of May, 1846, I had drawn in my office this lease and counterpart, dated 1st May, 1846, and they were executed in my presence by Bella Abrams, and taken by me to Mr. Dean to get his signature, which Mr. Dean declined to give without authority from the court—said leases have ever since been in my possession, ready to be accepted at any moment when the parties would execute them down to the commencement of this suit.

The counsel thereupon read the said lease in evidence.

Dated 1st day of May, 1846. Between Nicholas Dean, of the city of New York, guardian of Catharine Ann Barclay (late Holsman), Margaretta L. Barclay (late Holsman), Daniel Holsman, Maria M. C. Holsman, Eliza B. Holsman, and Julia Holsman, infant children of Daniel Holsman, late of New Jersey, deceased, of the first part, and Bella Abrams, of the city of New York, single woman, of the second part. Conveys all that certain lot of ground situate in the Eighth Ward of the city of New York, known and distinguished on a map of the property of Abijah Hammond, made by Daniel Ewen, City Surveyor, in the month of February, 1821, filed in the office of Register in and for the city and county of New York, in tin case, No. 13, as lot No. 157 (one hundred and fifty-seven), but now known as No. 20 Wooster street, bounded north-westerly in front by Wooster street, north-easterly by lot number one hundred and fifty-eight on said map; south-easterly, in the rear, by lot number one hundred and forty-six on said map; and south-westerly by lot number one hundred and fifty-six on said map, containing in breadth, in front and rear, twenty-five feet, and in length, on each side, one hundred feet, for the term

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of twenty-one years, from the first day of May, 1846, at the annual rent of two hundred and twenty-seven dollars and fifty cents, in equal quarter yearly payments.

Containing provision for re-entry and covenants, on part of the party of second part, for payment of rent, payment of all taxes, duties, and assessments, ordinary and extraordinary, during term, and surrender of premises on last day of term, or other sooner determination of lease. Also a covenant on part of party of the first part, for quiet enjoyment.

Signed and sealed by Bella Abrams.

On a cross-examination by counsel for the plaintiffs, the witness further testified as follows:

I drew the agreement for the appraisement; I was consulted by Miss Abrams before the, appraisement, and by Mr. Dean afterwards. I was the counsel for the Lorillard estate, and conducted the partition proceedings relative thereto. I was acting as counsel for both parties in the matter of procuring the execution of the new lease. I offered the lease to Mr. Dean, at his own office, about the first day of May, 1846. Mr. Dean asked me, at the time I took the lease and counterpart to him, if he had the right to execute them as guardian. I told Mr. Dean I would take the responsibility of the execution for Miss Abrams, if he would sign them; but that he had not a strict right, as guardian, to execute the lease without an order from the court of chancery. I am not certain whether I got the appraisement from Mr. Davis or Mr. Dean; I am inclined to think there were two valuations, and that one was handed to me, and one to Mr. Dean. I was employed by Mr. Dean to draw an application to the court of chancery for leave to execute the lease; I have the petition in my hands, signed and verified by Mr. Dean, the 8th of May, 1846. No order of the court was obtained.

The direct testimony being resumed, the witness testified as follows: The petition and affidavit, after been signed by Mr. Dean, were given to Mr. Dean for the purpose of getting the consent in writing.

(Counsel for the plaintiffs here objected to witness's reason for not getting the order. His honor, the judge, overruled the objection, and the plaintiffs' counsel excepted.)

Witness continued: After Mr. Dean had sworn to the petition, I left it with him to get the consent in writing of Mrs. Holsman, the widow of Daniel Holsman, and mother of the infants who resided in New Jersey, she being their guardian in the State of New Jersey, where they reside. The papers came back, with Mrs. Holsman's signature, to me some time afterwards; my impression is, some two or three months. I then took the papers to Vice Chancellor McCoun, with a draft order, for the purpose of getting his approval thereof, but the Vice Chancellor declined making such order without a reference, and the usual bond to each of the infants. I reported that fact to Mr. Dean, and Mr. Dean said he would not give any such bond, unless the Holsman family would furnish the security; nothing has been done about it since. In making the application, I acted as the counsel for Mr. Dean.

The evidence here closed.

The counsel for the defendant thereupon moved for a nonsuit, on the following grounds:—

1. That plaintiffs have not shown that the defendant occupied the premises in question by their permission.
2. That proof shows defendant occupied under George Lorrillard, and held by title prior to that of plaintiffs.
3. That the defendant, having performed the covenants in the lease on her part, the plaintiffs cannot collect any rent from her until they have performed the covenants on their part.
4. That the submission on the part of the guardian not being binding upon the plaintiffs, and being disavowed by them, is not binding upon the defendant.

The court denied the motion, and the counsel for the defendant excepted.

Thereupon, under the advice and direction of the court, and with the consent of the counsel for the respective parties, the jury found a verdict for the plaintiffs of seven hundred and twenty dollars, subject to the opinion of the court on this case, to be heard at a general term thereof, and also to adjustment.

B. T. Kissam, for the plaintiffs, insisted that they were en-

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titled to judgment upon the verdict as rendered, and relied upon the following points and authorities.

I. The occupation of the premises by the defendant is clearly proved, and is not disputed.

II. The defendant so occupied by the permission of the plaintiffs. 1. Proof shows that Catharine Holsman is the widow, and Catharine Ann Barclay, Margaretta L. Barclay, Daniel Holsman, Maria M. C. Holsman, Eliza B. Holsman, and Julia Holsman, the heirs-at-law of Daniel Holsman, deceased, to whom the premises in question were set apart in severalty, upon a partition of George Lorillard's estate, as one of his heirs-at-law;—the Barclays having married two of the daughters, and Nicholas Dean having been appointed the guardian of the infant children, prior to the commencement of this suit. 2. Payment of rent to Nicholas Dean, as guardian for infants, estops the defendant from disputing the title of the plaintiffs as landlords. (*Osgood v. Dewey*, 13 J. R. 240; *Nellis v. Lathrop*, 22 Wend. 121.) 3. The agreement made and entered into between Bella Abrams, the defendant, and Nicholas Dean, the guardian, establishes the fact that the occupation was by permission of the plaintiffs. (*Little v. Martin*, 3 Wend. 219.) 4. The tender of the lease executed by Bella Abrams, the defendant, to Nicholas Dean, the guardian, is a further acquiescence in the title of the plaintiffs.

III. The value of the use and occupation is distinctly proved and established. 1. By the testimony of Marsh and Davis. 2. By the agreement between the defendant and Nicholas Dean, the guardian, and the appraisement made thereunder. (See 2 R. S., 3d edit., p. 32, § 26; *Williams v. Sherman*, 7 Wend. 109.) 3. By the payment of \$227.50 the previous year. (*Abel v. Radcliffe*, 15 J. R. 507; *Bradley v. Covil*, 4 Cow. 350; *Evertsen v. Sawyer*, 2 Wend. 507, 512.) 4. By the lease executed by Bella Abrams, the defendant.

IV. The action for use and occupation can be maintained against a person holding over, under a covenant for renewal, contained in an expired lease of the same premises, and a failure on the part of the plaintiffs to fulfil the covenants on their part, contained in said lease, will not relieve the defendant

from the payment of rent. (*Abeel v. Radcliffe*, 13 J. R. 297; id. 15 J. R. 505; *Allen v. Pell*, 4 Wend. 506; *Etheridge v. Osborn*, 12 Wend. 529; *Sickles v. Frost*, 15 Wend. 559; *Holsman and others v. Abrams*—decided in this court June 28, 1851, and again March 6, 1852.)

V. The rent reserved in the original lease from George Lorrillard to Ebenezer Smith, being for the lot alone, without any buildings thereon, cannot be the criterion in ascertaining the value of the rent of the house and lot, and the law raised no implied agreement in such a case, that the old rent shall be the measure of damages. (*Abeel v. Radcliffe*, 15 J. R. 505.)

VI. The plaintiffs are entitled to judgment for the amount claimed in the summons, with interest, from the several quarter days upon which the rent fell due and payable.

C. W. Sandford, for defendant, *contra*.

I. The defendant does not hold under the plaintiff, but under the original lease, and is not liable in an action for use and occupation.

II. The defendant having complied with all the terms of the lease on her part, the plaintiff cannot collect any rent until they have performed the covenants on their part.

III. Where, by the terms of a lease, the tenant is to be paid for improvements, at the expiration of the term, an agreement by the lessor will be implied that the lessee may retain possession until such payment is made, although the term has expired (*Van Rensselaer v. Penniman*, 6 Wend. 569).

IV. Where a tenant for a term of years holds over, without any new agreement between the parties, he holds, subject to all the covenants of his old lease, applicable to his new situation; and the law implies the same terms (*De Young v. Buchanan*, 10 Gill. & Johs. 148; *Philips v. Menge*, 4 Wharton, 226).

V. The submission of the guardian not being binding on plaintiffs, and being disavowed by them, is not binding on defendant.

VI. If plaintiffs can recover at all in this action, they can only recover the rent reserved by the original lease.

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By THE COURT. DUEK, J.—We do not at all doubt that the defendant is entitled to retain the possession of the demised premises, as she now holds them, until the owners of the reversion, in performance of the covenants in the original lease, shall have actually paid or tendered to her the appraised value of the dwelling-house, which has been erected on the lot, or shall have granted to her a new lease, for the additional term of twenty-one years ; and, to this extent, the case of *Van Rensselaer v. Penniman* (6 Wend. 596), to which we were referred, may be regarded as a decisive authority. But neither this, nor, as we believe, any other adjudged case, can be cited, to prove that, while she thus retains the possession, the relation of landlord and tenant is wholly dissolved, so as to discharge her absolutely from the payment of rent ; and, to a doctrine so unreasonable in itself, unless shown to be established as law, it is not probable that the assent of this Court will ever be given. It has long been, and probably still is in the power of the parties,—of the plaintiffs as owners of the fee, and of the defendant as tenant,—to demand, and compel a specific performance of the covenants in the original lease, but, as neither party has chosen to take the necessary steps for this purpose, we see nothing to distinguish this from any other case, in which the tenant holds over, after the expiration of the lease, with the consent of the landlord. It is, therefore, by the rules of law applicable to such cases, that our decision must be governed.

But although we must hold that the defendant is liable in the present action, it by no means follows, that she is liable for the whole rent which the plaintiffs claim, and for which the verdict has been conditionally rendered.

It is settled law that, when a tenant for years is permitted to hold over after the expiration of his term, he becomes a tenant from year to year, according to the terms and conditions of the original lease, which, with the single exception of the duration of the term, continues to be, not only the proper, but the sole evidence of the subsisting contract of the parties. It is, therefore, the rent reserved by this lease, and that alone, that the tenant is bound to pay, and it is this, and no more, that the landlord can lawfully exact, unless it is proved to have been

altered by a new and express agreement (*Knight v. Darley*, 1 Term R. 162; *Doe v. Bell*, 5 Term, 471; *Digby v. Atkinson*, 4 Camp. 277; *Harding v. Crithon*, 1 Esp. N. P. Cases, 59; *De Young v. Buchanan*, 10 Gill. and John. 149; *Philips v. Menge*, 4 Whar. 226). It was not denied by the counsel for the plaintiff, that the general rule is such as we have stated, but he insisted that there are valid reasons for excepting the present case from its application. He required us to hold that the payment to the guardian of the infant plaintiffs, of the sum of \$229.50, as the rent for a single year, is conclusive evidence of a new agreement, binding her to the payment of the same rent so long as her possession has lasted, and shall continue.

But it is impossible for us to give this effect to the payment in question, without contradicting our former decisions, by which, in sustaining the demurrer of the plaintiffs to the answer first interposed by the defendant, we held that the agreement between herself and the guardian bound him, either to grant her a new lease for twenty-one years, or to pay her the estimated value of her dwelling-house, and the evidence clearly shows that it was in consequence of this agreement, and of the appraisement that followed, and in the full belief that a new lease would be given, in which the sum she then paid, would be reserved as the annual rent, that she consented to the payment now relied on.

We cannot, therefore, regard the payment as evidence of a promise to pay the same sum as an annual rent, so long as she was suffered to hold over under the original lease, when it is proved to have been made under a distinct agreement, which we have adjudged to be void, and upon a consideration that has wholly failed. It would be most inequitable to charge her with an increased rent, while the lease, which was to be the consideration of its payment, is still withheld, and we cannot hold that she is bound by an agreement which the plaintiffs, as made by their guardian, without authority, have chosen to repudiate. We cannot say that an agreement, not binding on the plaintiffs, is binding on her.

It was next insisted, that there is another and distinct ground upon which we are bound to say that the plaintiffs are entitled to the whole rent which they demand.

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The rent in the original lease, it is said, was merely a ground rent, having reference only to the naked value of the lot, and that, as a dwelling-house has since been erected, by which the value of the occupation of the premises has been greatly increased, it is reasonable and just, that a rent proportionate to this increase should now be allowed; and, in support of the position that the plaintiffs have a legal right to demand this allowance, we were referred to the decision of the Supreme Court in *Abeel v. Radcliff* (15 John. 505), as a direct and controlling authority. Our examination of that case, however, has led us to a very different conclusion. If it is to be regarded as an authority at all, we are satisfied that it is directly opposed to the claim of the plaintiffs. It is true that, in *Abeel v. Radcliff*, although there was no evidence of a new agreement, a tenant holding over was held to be liable to an increase of rent, in proportion to the increased value of the premises, but the only ground of this decision was, that the improvements to which the increased value was owing, and which had been made during the term, became, upon its expiration, the sole property of the landlord. The dwelling-house, in the case before us, since the expiration of the lease, has been, and still is, not the property of the plaintiffs, but of the defendant. In a qualified, but still in a legal sense, by force of the covenants in the original lease, she is its owner, and it is only by granting her a new lease, or by paying her its value, that the plaintiffs can divest her title. The reason, therefore, for admitting that exception from the general rule, which the decision in *Abeel v. Radcliff* appears to sanction, is wholly false.

But were the facts in this case exactly similar to those in *Abeel v. Radcliff*, we are by no means prepared to say that we should hold ourselves bound to follow the decision. It was that of a bare majority of the court. Chief Justice THOMPSON and Mr. Justice PLATT dissented from the judgment, and the former supported his dissent by reasons which we think it would be difficult to answer. It is certain that the case stands alone, and in principle is not easy to be reconciled with prior authorities; but, admitting it to be sound law, we cannot doubt that even the judges who concurred in the decision, would have rejected the claim of the plaintiffs in this suit, in

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the extent to which it has been urged. They must have done so, in consistency with their own reasoning.

Our conclusions, then, are, that no valid reasons have been shown for excepting this case from the general rule, that a tenant holding over is liable only for the rent mentioned in his lease, and that, on the other hand, there are special reasons for enforcing the rule in its strictest application. It is exactly the rule which a just regard to the intention of the parties to the original lease, as manifested by its terms, requires us to follow. The covenants to which we have referred evidently show, that it was not intended that the owner of the reversion should be placed in a situation to demand an increased rent upon the expiration of the lease, by any other means than by granting a new lease, or paying to the tenant the value of the improvement.

Hence the plaintiffs, until, by performing these covenants, they shall secure to the defendant the benefit to which she is entitled, will have no right to complain that the only rent they can be permitted to recover, is that which the lease stipulates to be paid. It may be, and doubtless is, greatly disproportionate to the present value of the premises, but it is that to which the law, and the contract of their ancestor, alone entitles them.

The original lease embraces two lots, and reserves an entire rent of \$125. The defendant is the tenant of only one lot, and apportioning the rent equally, is liable but for the annual rent of \$62.50.

It is upon this principle that the verdict must be reduced and adjusted.

Judgment for the plaintiffs, upon the verdict, as reduced.

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Where a bond is executed to a sheriff by a deputy, and a third person as surety for the deputy, in an action by the sheriff against such surety, to recover the amount which the sheriff has been compelled, by judgment, to pay for defaults
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of the deputy, covered by the condition of the bond, the record of the judgment against the sheriff is *prima facie* evidence in the action against such surety of the deputy's default, on its being proved that the deputy had notice of, and an opportunity to defend the suit against the sheriff, although the surety himself had no notice of it. Where the alleged negligence was in not levying an execution when the debtor has property to satisfy it, proof that the execution was committed to the deputy, a recovery against the sheriff, and notice to the deputy of a suit against the sheriff, and payment by the sheriff of the judgment so recovered, *prima facie* entitle him to recover against the deputy's surety. The reasonable expenses of the sheriff in defending the suit against himself are also recoverable.

A bond conditioned to indemnify the sheriff against all damages, costs, and charges to be imposed upon or demandable of the sheriff, in consequence of the deputy's default, is an agreement to indemnify against a legal liability. Judgment for plaintiff upon verdict.

(Before DURA, BOSWORTH, and EMERY, J.J.)

October 20; December 24, 1852.

CASE upon a verdict for the plaintiff, subject to the opinion of the court at general term, upon the exceptions taken on the trial.

The action was brought by the plaintiff, late sheriff of the city and county of New York, against the defendant, as one of the sureties upon the bond given to the plaintiff, as sheriff, by Thomas Dunlap, one of his deputies, for the faithful performance of the duties of his office.

The complaint assigned the following breaches of the condition of the bond.

First,—That on the 24th of November, 1849, an execution in favor of Jeremiah Russell, against Thomas Sheldon and others, for \$396.75, was delivered to Dunlap for service, upon which he made a false return of "no goods, &c.," for which false return a judgment was obtained against the plaintiff, on the 17th December, 1851, for \$688.34, which he paid, and in addition, for costs and counsel fees, \$225.75, making, in the whole, \$913.79, of which sum the sureties on the bond paid \$650, leaving the balance due to the plaintiff.

Second,—That on the 1st of February, 1849, an execution in favor of Mason & Thompson, against Sheldon & Duncan, was delivered to Dunlap for service, who levied the same, but afterwards released the property, under an agreement to transfer the levy to other property, which afterwards, and after the

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return day of the execution, he levied upon and sold ; that thereafter, one Charles T. Shelton, as mortgagee of the property thus sold, commenced an action in this court, against the plaintiff, and recovered a judgment therein, amounting, with interest, to \$1,842.39, which plaintiff paid in September, 1852, and also paid for costs and counsel fee, in defending the suit, \$263.82. The whole balance claimed to be due to the plaintiff was \$2,535.35.

The answer admitted the execution and delivery of the bond, and took issue upon the breaches.

The cause was tried before DURE, J., and a jury.

The plaintiff's counsel, upon the trial, produced in evidence the bond upon which the action was brought. It was dated 16th January, 1847, and was executed under the hands and seals of Dunlap, the deputy, as principal, and of Peter Smith and the defendant, as his sureties.

The condition is in these words :

" The condition of this obligation is such, that if the said Thomas Dunlap shall in all things well and truly execute the office aforesaid ; and if the said Thomas Dunlap, and the above bounden Peter Smith and Bartlett Smith, their heirs, executors, and administrators, and every of them, do, and shall, from time to time, and all times hereafter, save and keep harmless and indemnified, the said John J. V. Westervelt, sheriff as aforesaid, his heirs, executors, and administrators, and every of them, and every of their goods and chattels, lands and tenements of, touching and concerning, the execution and return of all such process, writs or warrants, of what nature soever, as are or shall be delivered to the sheriff of the said city and county of New York, or directed to him, and shall be brought and delivered, or offered to be delivered to the said Thomas Dunlap, during the time he, the said Thomas Dunlap, shall or may, by virtue of the warrant aforesaid, use or exercise the said office of deputy sheriff aforesaid ; and shall also save and keep harmless and indemnified, the said John J. V. Westervelt, his heirs, executors, and administrators, and every of them, of, from, and against all issues, fines, demands, damages, costs, and charges whatsoever, hereafter to be produced, imposed, prosecuted, demanded or demandable, of or against the said John

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J. V. Westervelt, as sheriff as aforesaid, his heirs, executors, or administrators, or his or their goods or chattels, lands or tenements, for or by reason of any other neglect of any kind whatsoever, of the said Thomas Dunlap in executing wrongfully, or neglecting to execute the said office of deputy sheriff, for the said city and county, during the time aforesaid ; and also, for or by reason of any manner of nonfeasance, or misfeasance, or misconduct of the said Thomas Dunlap, in any wise touching the execution of his said office of deputy sheriff, during the time aforesaid, then the above obligation to be void and of no effect, else to be and remain in full force and virtue."

The plaintiff's counsel then put in evidence the records of the judgments which, as stated in the complaint, had been obtained against the plaintiff, and proved that the execution falsely returned, and that under color of which the property mortgaged to Shelton was sold, had been placed in the hands of Dunlap as a deputy sheriff, and that the false returns and the sale were made by him. It was also proved that for the purpose of satisfying the judgments, and for costs and counsel fees in the defence of the suits, the plaintiff had paid the sums mentioned in the complaint. An affidavit, made by Dunlap, to procure a postponement of trial of *Shelton v. Westervelt*, in which he swore to the absence of one Wallenbeck, whose testimony, he swore, he had been advised by counsel, was material to him (Dunlap), was read in evidence to prove Dunlap's knowledge of the pending of the action.

It also appeared, from the testimony of Dunlap, who was examined as a witness, that he was present at the trial of both the actions, in which the judgments against the plaintiff were obtained.

The counsel for the defendant objected in due time to the admissibility of the judgment records and executions, above mentioned, as evidence against the defendant, upon the ground that it had not been proved, that the defendant had any notice of the commencement or pendency of the actions in which the judgments were obtained, and had therefore no opportunity of defending the same. The objection was overruled by the court, and the counsel excepted.

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When the plaintiff rested, the counsel for the defendant moved, upon the same ground, that the complaint should be dismissed. The court denied the motion, and the counsel excepted. Other exceptions taken on the trial are omitted, as they were not insisted on at general term.

When the testimony on both sides was closed, the judge stopped the counsel from addressing the jury, stating that in his opinion there was no question of fact necessary or proper to be submitted to their determination, and that he should instruct them that upon the evidence given the plaintiff was entitled to their verdict for the full sum demanded by the complaint. The verdict would, however, be subject to the opinion of the court at general term, upon the questions of law that had been raised by the defendant's counsel.

The defendant's counsel excepted to the refusal of the court to permit him to address the jury upon the facts.

The jury, under the direction given to them, found a verdict for the plaintiff for \$2,535.44, besides costs, subject to the opinion of the court at general term.

A. J. Willard, for the defendant, now moved to set aside the verdict, and for a new trial, and rested his argument upon the following points and authorities.

I. The plaintiff wholly failed to establish a breach of the deputy's bond, and therefore the court erred in refusing to dismiss his complaint. 1. The only proof offered to establish a breach, were the judgment records in the respective suits of Thompson & Shelton against Westervelt; these records do not conclude the present defendant, and are not even *prima facie* evidence of a breach, the defendant having had no notice of their pendency, or opportunity to defend. (*Blasdale v. Babcock*, 1 J. R. 516; *Kipp v. Brigham*, 6 ib. 158, 7 ib. 167; *Trustees Newburgh v. Galatin*, 4 Cow. 340; *Bartlett v. Campbell*, 1 Wen. 50; *Riley v. Seymour*, 1 ib. 143; *Hall v. Luther*, 13 ib. 491; *Peck v. Acker*, 20 ib. 605; *Oakley v. Aspinwall*, 4 Coms. 513; *Overseers v. Mumford*, 2 Rand. Va. 313; *Bender v. Fromburger*, 4 Dall. 436; *McKellar v. Powell*, 4 Hawks (N. C.), 84; *Beall v. Beck*, 8 Harris & McHenry, 243.) 2.

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The plaintiff not only failed to prove notice to the defendant of the pendency of these suits, but failed to establish even notice to the deputy, Dunlap. (a.) The proof of notice must be by evidence extrinsic the record, and it is not competent to refer to statements in the record to establish such fact. (b.) The only extrinsic proof to this point is the affidavit of merits in the Shelton suit, and it was for the jury, and not for the court to say that this establishes the fact of an opportunity on the part of Dunlap to defend.

II. The court erred in admitting the records in evidence.

II. If the question of notice to Dunlap is to be regarded as material, in reference to the defendant, the court erred in refusing to allow the defendant to go to the jury on the question of notice.

IV. Defendant was not liable for costs paid by plaintiff, at all events not for counsel fees. (*Franklin v. Hart*, 2 Hill, 671.)

The learned counsel, in the course of his argument, proposed to show that it appeared upon the face of the record, in the case of *Shelton v. Westervelt*, that Dunlap, in selling the property covered by Shelton's mortgage, had not been guilty of any breach of the condition of his bond, i. e. that the sale was justifiable and lawful. But the court stopped him, saying that the question of the legality of the sale must be considered as finally decided by the judgment which they had pronounced in *Shelton v. Westervelt* (vide 1 Duer 109).

A. J. Vanderpoel, contra, insisted that the plaintiff was entitled to judgment upon the verdict.

I. The motion for a nonsuit was properly denied. It was not necessary for the plaintiff, Westervelt, to give notice to the sureties of the deputy of the actions brought against him by Russell and by Shelton. The bond did not stipulate for notice as a condition of his liability, but was a general bond to "indemnify and save harmless." 1. Hurlstone declares the rule to be "where the obligor of an indemnity bond undertakes generally to save harmless from the consequences of a particular act, the bond is forfeited upon the obligee being damnified; and it is not necessary that notice should be given to the obligor, whether the indemnity be against the

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acts of the obligee or a third person." (Hurlstone on Bonds, 9 Law Lib. (old series) 93; *Outler v. Southern*, 1 Saund. R. 117; *Ker v. Mitchell*, 2 Chitt. R. 487; Comyn Dig. "Condition" T.) 2. The omission to give notice does not go to the right of action; the judgment in such case is at least *prima facie* evidence against the surety. But where notice is given, if the surety refuses to defend, the judgment becomes conclusive evidence, and estops the surety from denying that the defendant in the first action was not bound to pay the money. (*Duffield v. Scott*, 3 T. R. 374; *Aberdeen v. Blackmar*, 6 Hill, 324; *Smith v. Compton and others*, 3 B. & Ad. 106; *Andrus v. Beals*, 9 Cow. 693; *City of Lowell v. Parker*, 10 Metc. 314, 315; the same effect has been given to a verdict where no judgment had been perfected; *Lee v. Clark*, 1 Hill, 56; *State of Ohio v. Colerick*, 3 Hammond, 487.)

II. The plaintiff, upon the evidence, was entitled to recover the amount paid by him upon the judgments recovered against him, and his costs in the defence of those suits. He proved every allegation in his complaint, and the answer did not avoid them by new matter. 1. An undertaking to indemnify against a certain engagement, or a general guarantee, will extend to any expense which falls upon the obligee by reason of that engagement. (Hurlstone on Bonds, 93; *Sparks v. Martindale*, 8 East. 593; *Smith v. Compton*, 3 B. & Ad.; 23 Eng. Com. Law R. 407.)

III. There was no conflict in the evidence, and no question of fact for the jury.

By THE COURT. BOSWORTH, J.—The affidavit, made by Dunlap, to procure a postponement of the trial of Shelton against Westervelt, was read in evidence without objection. That shows very clearly that Dunlap himself not only had actual notice of the pendency of that suit, but undertook the defence of it, so far as to endeavor to procure the testimony of witnesses deemed material, and that its defence was regarded by him as a defence made by himself. It also appears, by his own testimony, that he was present at the trial of *Russell v. Westervelt*, and that he therefore had notice of that suit, and, presumptively, an opportunity to defend it.

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Considering the relation he occupied towards the sheriff, the fact of his having the exclusive control of the executions, and the further fact, that, during the pendency of the suit brought by Shelton, he made the affidavit, and deposed to the matters stated in it, to procure a postponement of that trial; and the further fact, that both suits were commenced in the same month, and defended by the same attorneys, I think are evidence sufficient, uncontroverted, to justify a jury in finding that Dunlap had notice of the pendency of both suits, and an opportunity to defend. It was not objected, however, that sufficient notice of the pendency of these suits had not been given to Dunlap, but that no notice had been given to the defendant, his surety. If the view expressed, that there is sufficient proof of notice of them to Dunlap, be correct, then the judgments recovered against Westervelt were not only *prima facie*, but were conclusive evidence of Dunlap's liability to Westervelt, co-extensive with that of Westervelt to those plaintiffs, according to the form, force, and effect of such recoveries.

If they would conclude Dunlap in an action against him, on this bond, the question remains whether they are any evidence of the liability of Bartlett Smith in this action? The question, in this case, is not whether they are conclusive evidence against the surety, but whether they are *prima facie* evidence—after first proving that these executions were in the hands and under the control of Dunlap.

In *Bartlett v. Campbell* (1 Wend. 50), Campbell signed as surety for Jeffords an indemnity to the plaintiff as constable, to induce him to levy on, and sell, on an execution in favor of Jeffords, certain personal property. He did levy on and sell it. He was sued by A. Shaw, who claimed the property as his. The plaintiff gave notice of the commencement of that suit to Jeffords, but not to Campbell, and allowed judgment to pass by default. Bartlett, in the suit against Campbell, was nonsuited because no notice of the suit had been given to the latter. The Supreme Court reversed the judgment solely on the ground that that decision was erroneous, and that notice to the principal was sufficient to make the judgment against the plaintiff *prima facie* evidence of the liability of the surety in an action against him.

Where a want of good faith, industry, and sound discretion

in the defence of the suit is not pretended, notice to the surety, in a case like this, is practically an idle ceremony. The surety cannot be presumed to be cognizant of any facts connected with the defence. When his principal, the deputy, has had notice of the suit, has actually assumed its defence, and it has been fully tried on its merits, with the aid of all the information relative to the merits possessed by the party whose conduct is the subject of controversy, it cannot be presumed that another trial, when defended by the surety instead of the deputy, could be attended with any different result.

Unless some principle or right is clearly violated, by an adherence to the decision in *Bartlett v. Campbell*, it would seem to be the duty of the court to follow it. It was decided some twenty-five years ago, and does not appear to have been since questioned by the court that made it.

The questions at issue, and to be determined in this action, are these: Had Dunlap so negligently performed his duties in respect to these two executions that Westervelt had been damaged thereby, and, if so, to what amount? The evidence produced established the facts, that as between Westervelt and the plaintiffs in those two executions, it had been incontrovertibly determined, that Westervelt should pay the amount of those two judgments, by reason of a neglect or improper performance of official duty, with respect to them. The evidence given was also conclusive against Dunlap that the fault was his own, and of his liability to pay to Westervelt the same amount. The liability of Dunlap to Westervelt, as between themselves, the defendants could not controvert; no fraud, or want of good faith in conducting the defence being averred. (*Candes v. Lord*, 2 Coms. 275.) Dunlap being personally concluded as to his own liability, does not the evidence which establishes it, at least *prima facie* prove that of the defendant?

Does not evidence, which is conclusive against Dunlap of his breach of the bond, at least *prima facie*, prove his breach of it, as against the surety? The reasoning of the court in *Drummond v. Preston* (12 Wheat. 515), directly supports this proposition, and affirms the principle, that evidence which is competent to show the default and which establishes the liability of the principal, at least *prima facie*, establishes the liability

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of a surety, who has undertaken that the acts or omissions of his principal shall not damnify the plaintiff. In *Drummond v. Preston*, the court considered the case of *Beal v. Beck*, reported in 3 Harris and M'Henry, 243, and disapproved of it, if it was to be regarded that such a record was not *prima facie* evidence against a surety, but agreed that it was properly decided, if the record was offered as conclusive against the surety.

In *Lee v. Clark* (1 Hill, 56), the condition of the bond was, that Parmenter (for whom Clark signed as surety) "should pay or save the plaintiff harmless." A verdict, in a suit against Parmenter, of which Clark, the surety, had no notice, was held *prima facie* evidence of the amount of the surety's liability. *Duffield v. Scott* (3 T. R. 374) was cited as an authority conclusive upon the case, and sound in its principles.

The bond in suit is conditioned, among other things, to indemnify Westervelt against "all damages, costs, and charges whatsoever, hereafter to be imposed, or demandable of or against him."

Certain damages, costs, and charges are proved by evidence conclusive, as against Dunlap, to have been imposed upon, and to be demandable of him, by reason of defaults of Dunlap, against which the defendant undertook to indemnify him. This bond is conditioned against some of the same matters as that in *Duffield v. Scott*, viz. against "all costs, charges, and expenses whatsoever, which the plaintiff, at any time thereafter, should pay, sustain, or be put unto," &c. (3 T. R. 374.)

The terms of the bond in suit imply, that the obligors anticipated suits would be brought to charge the sheriff for alleged defaults of the deputy, Dunlap, and by it the obligors agreed to indemnify the plaintiff against all "issues and demands" prosecuted, and against "all fines, demands, costs, and charges" imposed or demandable of him by reason of such default.

When suits are proved to have been brought against the sheriff, which resulted in imposing demands, costs, and charges upon him, which he has been compelled to pay, and such further evidence is given, competent as between these parties, as establishes conclusively the personal liability of Dunlap, as between him and the plaintiff, it seems to me that, as a matter

of common sense, it also establishes, *prima facie*, as against his surety, the fact of such liability, and that such damages, costs, and charges were so imposed by reason of Dunlap's default.

In *Franklin v. Hunt* (2 Hill, 671), which was an action against the deputy, Anderson, and his sureties, to recover a bill of costs, to which the sheriff had been subjected in successfully defending a suit brought to recover a penalty by reason of alleged violation of official duty by the deputy, the pleader merely alleged notice to the deputy, and averred no notice to the sureties of such action. Although the case presents no question decisive of any point named in the case, the pleadings indicate an understanding of the profession, that notice to the deputy, without notice to his sureties, was sufficient to make the record of recovery against the sheriff, in such a case, evidence against the deputy's surety.

In *Lewis v. Know* (2 Bibb. 453), in an action on the surety-bond of the deputy, the court below held the record of a recovery against the sheriff for not returning an execution, evidence of the deputy's liability, without proof of the fact that the execution had been in his hands. The court above reversed the judgment on the declared ground that the record was not evidence, unless accompanied with proof that the execution had been placed in the charge of the deputy. It does not appear from the report of the case, that notice of the suit was given to the deputy. The decision implies that the court was of the opinion that the record of the recovery against the sheriff, with proof that the deputy had charge of the executions, was *prima facie* evidence of the liability of the deputy and his sureties in an action against them by the sheriff. (Vide *Atkins v. Baily et al.*, 9 Yager, 111.)

In this case that evidence was given, and in addition to it, it was proved that the deputy had notice of the pendency of both actions against the sheriff, actually participated in the defence of one of them, and the inference is not an unreasonable one, that he took part in the defence of the other.

The theory of the rule, that notice to the sureties of an action brought against their principal, and the tender of an opportunity to defend, make the recovery against the principal

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conclusive against the latter is, that they operate to make the judgment, in legal effect, a judgment against themselves. Whatever is conclusive evidence against the deputy is, at least, *prima facie* evidence against his sureties.

Tyler v. Ulmer (12 Mass. 164) was an action against the sheriff for the default of Minott, his deputy, in not satisfying an execution out of goods which the latter had attached at the suit of the plaintiff. The evidence that Minott had received the execution in time to make it his duty to levy it, consisted of letters from him to the plaintiff's attorney. To the admission of this evidence the defendant excepted. The court held the letters to be properly admitted, and said that "the action, although in form against the sheriff, is substantially against the deputy, who is immediately answerable over to the sheriff upon his bond, and against whom the verdict may be used as evidence to establish the claim of the sheriff against him."

"We are also well satisfied that the practice has uniformly been to prove the necessary facts by the confession, oral or written, of the deputy in actions against the sheriff." (2 Phil. Ev., 7th edition, 379-380; *Mott et al. v. Kip*, 10 J. R. 473.)

City of Lowell v. Parker et al. (10 Metcalf, 309) was an action brought in behalf of one Bean against Parker, a constable, and his sureties, to recover the amount of a judgment previously obtained by Bean against Parker, for the value of property taken by the latter *colore officii*. Parker's sureties had no notice of the pendency of that action, and the question was, whether the judgment against Parker was evidence against the sureties of a breach of duty by Parker.

The court said: "But it is objected that this judgment was not admissible, because the sureties were not notified, and therefore it was *res inter alios*. But we think this objection cannot be supported under the circumstances of this case. When one is responsible, by force of law or by contract, for the faithful performance of the duty of another, a judgment against that other for a failure in the performance of such duty, if not collusive, is *prima facie* evidence in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside. But otherwise it is *prima facie* evi-

dence, to stand until impeached or controlled, in whole or in part, by countervailing proofs."

In the case last cited, the constable was concluded by a recovery against himself. Of the suit in which it was had, his sureties had no notice.

In the case before us, evidence of the deputy's default which concluded him, was given. In either case such evidence was competent proof of his default in an action against the sureties, and *prima facie* established it as against them.

In *Train v. Gould* (5 Pick. 380) the defendant agreed with the plaintiff, that one Ashley, who had given the plaintiff an indemnity bond against the consequences on levying on property pointed out by Ashley, "should indemnify (him) in the premises according to the terms of his engagement to (the plaintiff)." The plaintiff was sued by one Touro for taking the property, and the latter recovered. Gould had no notice of the pendency of Touro's suit against the plaintiff, but there was evidence tending to show that Ashley had notice of it. The evidence was not very explicit, and there was some reason to doubt whether Ashley had such notice as gave him an opportunity to defend it. The judgment recovered by Touro against the plaintiff was put in evidence against the objection of the defendant.

The court charged the jury that "if they were satisfied that Ashley had seasonable notice to prepare for the defence of that suit, they must consider it conclusive; but if they were not so satisfied, they must consider it as only *prima facie* evidence, and must determine upon all the evidence whether Touro ought to have recovered in that suit, and if so, how much." The jury found for the plaintiff. The defendant moved for a new trial, upon exceptions taken to the decision of the court, and on a case on the further ground that the verdict was against evidence.

The court held the instructions given to the jury to be clearly correct, and stated that, from the amount of the damages found, it must be presumed the jury considered the judgment conclusive.

It will be noticed that *Train v. Gould* was against the surety only, and that his liability arose upon an instrument

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separate from that signed by Ashley, his principal, and of a subsequent date. In that respect, it was a weaker case for the application of the rule which the court held to be controlling, than that of *Bartlett v. Campbell* (1 Wend. 50).

In this case it is not necessary to go as far as the court went in *Train v. Gould*, to hold that the plaintiff is entitled to a judgment on the verdict. It is only necessary to hold, that as the evidence given was competent, and concluded Dunlap on the questions of his default, liability, and the extent of it, it *prima facie* established them against Bartlett Smith, who, by his contract, undertook that Dunlap should not be guilty of any default, and that the plaintiff should not be damnified by it.

This bond seems to be more than a contract of indemnity against damages to result from liabilities to which the sheriff may be subjected by reason of the deputy's default. Its condition is totally unlike that of the bond in *Gilbert v. Winans* (1 Comst. 550). The condition of that was that the "sheriff should not sustain any damage or molestation whatever by reason of any act from this date done, or any liability incurred by and through said deputy." The latter case was held not to be an indemnity against a liability or charge, but against actual damages resulting from a liability or charge.

In this case the defendant contracts to indemnify the plaintiff "against all issues, fines, demands, damages, costs, and charges whatsoever, hereafter to be produced, imposed, prosecuted, demanded or demandable, of or against the said John J. V. Westervelt, as sheriff as aforesaid."

It is an indemnity against "damages imposed;" "costs and charges imposed;" and "damages, costs, and charges demandable" of him. If it is an undertaking that no damages should be demandable of him, and no costs and charges imposed upon him by reason of Dunlap's default, then it was an indemnity against a legal liability, and the recovery of the judgments against Westervelt, for the default of Dunlap, was itself a breach of the bond, and entitled the plaintiff to recover.

The terms of the condition would seem to be as comprehensive as the terms of the contract of indemnity in *Chase v. Hinman* (8 Wend. 452), and *Warwick v. Richardson* (10 Mees. & Welsby, 284). These were held to be indemnities against a

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legal liability, and those cases are cited with approbation in *Gilbert v. Winans*.

In *Warwick v. Richardson*, it was an indemnity against "claims made;" in this case, it is against "damages, costs, and charges imposed," or "demandable."

In this case, the plaintiff was to be saved from damages, costs, and charges imposed upon, or demandable of him. That was the act to be done. Its non-performance was a breach of the bond, and the legal liability of the sheriff, or, in other words, the amount of the damages, costs, and charges imposed upon and demandable of him, is the measure of damages. Damages, costs, and charges have been incontrovertibly imposed, and are incontrovertibly demandable to the amount of the judgments recovered, in "issues prosecuted" against the present plaintiff.

Many of the cases already cited are full to the point, that the sheriff is equally entitled to recover the necessary costs of a defence, made in good faith, as the costs awarded against him, and forming part of the judgments.

Under all the circumstances of this case, we think the sheriff is entitled to a judgment on the verdict.

SEE and another *v. PARTRIDGE*.

The plaintiffs by their complaint demanded judgment as follows: 1. For a certain sum alleged to be the balance due to them upon a building contract between them and the defendant. 2. For another sum for extra work and materials. 3. For another sum as damages sustained by them by reason of having been hindered and delayed by the defendant in the completion of this work. And lastly: That a certain award, made by an arbitrator mutually chosen, in relation to certain disputes growing out of the contract, should be set aside as obtained by fraud or undue influence.

Held, that as equitable and legal relief may now be sought in the same action, and all the causes of action set forth in the complaint grew out of the same transaction, they were properly united.

Held, that as the action was not for the recovery of money only, it was properly heard at special term without a jury; and that the court, although denying

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the equitable relief demanded, had power to grant any other relief consistent with the case made by the complaint and embraced within the issues.

Held, therefore, that although the court at special term held the award to be binding on the parties, its judgment in favor of the plaintiffs upon the other causes of action set forth in the complaint, was valid.

Judgment affirmed, with costs.

(Before OAKLEY, Ch. J., and EMMET, J.)

November 9; December 10, 1853.

APPEAL, by defendant from a judgment at special term, in favor of the plaintiff, for \$1,228.10, with costs.

The action was tried before Bosworth, J., at a special term, on the 28th May, 1853.

The nature of the controversy, the questions raised and decided, and the exceptions taken, sufficiently appear in the statement of facts found, and in the opinion delivered by him.

The judgment of the court, at special term, embracing the facts as found, is as follows:

On the 6th February, the plaintiffs, of the one part, who were carpenters and partners under the partnership name of See & Brown, entered into a written contract with the defendant, of the other part, which was duly executed by all of the said parties, which contract was of the tenor and effect that is alleged in the complaint to have been, and a true copy thereof is annexed to the answer of the defendant in this action.

That the plaintiffs fully executed the contract on their part, and obtained a certificate from the said architect, in the form and to the effect provided in and by the said contract, and furnished satisfactory evidence to the defendant that all the materials furnished and work done had been paid for by the plaintiffs. During the progress of the said buildings the defendant requested, and the plaintiffs, in pursuance of such request, made various alterations, deviations, additions, and omissions from the contract.

That on the completion of the said buildings the sum of \$1,850 of the said contract price was in arrear and unpaid by the defendant to the plaintiffs, and that no part of the same has been since paid by the defendant.

That a dispute arose between the parties respecting the true value of said extra work, and also of the works omitted.

That thereupon the parties entered into a written agreement,

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signed by them, and dated November 8, 1852, by which they agreed to abide the decision of John Millington, architect, as to the deductions to be made, or extras to be added, in settlement of the said contract.

The architect, under the said agreement, entered upon an examination and consideration of the matters so submitted, and on the 10th of November, 1852, made his decision in writing, and delivered it to the parties, by which he decided that there should be deducted from the contract price and allowed to the defendant by reason of work omitted and called for by the contract, the sum of \$1,428. That there should be credited and allowed to the plaintiffs for extra work done by them, not called for by the contract, the sum of \$712. That after crediting the defendant with the said sum of \$1,428, and charging him with the said sum of \$712, there was actually due and owing from the defendant to the plaintiffs, under the said contract, on the 10th of November, 1852, the sum of \$1,134, no part of which has been paid, which with the interest thereon to the date hereof, amounts to the sum of \$1,178.10.

That the said Millington did not appoint any time and place for the parties to appear before him, and be heard with respect to the matters so submitted, and neither of them did appear before or was heard by or spoke to him in respect thereto.

That he was personally acquainted with and knew of the omissions and extra work to which the submission related, and all the parties verbally agreed and declared to him, at the time of the submission, that neither of them should appear before him or speak to him in relation thereto until after his decision should be made and published.

The decision has not been acquiesced in by the plaintiffs, or acted upon by them, since it was made and announced.

That said decision was made *bona fide* without any misrepresentations or any representations whatever being made, or any undue influence exercised, or attempted to be exercised, by the defendant. That the mason work done in the erection of said buildings was done by the defendant himself, and was so unreasonably delayed by him, that for that cause alone the plaintiffs were not only prevented from completing the buildings within the time specified in the contract, but were

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delayed several months thereafter in the completion thereof, and subjected to damages resulting from the loss of time of themselves and their servants, and the disadvantage at which they labored while actually working in the erection of said building, and resulting solely from the delay of the defendant in doing such mason work.

That the damages resulting to the plaintiffs from that cause, amount to the sum of \$50, which sum is included in and forms part of the amount hereinafter decided to be recoverable from the defendant by the plaintiffs.

The plaintiffs objected to the admission of evidence to prove that it was verbally agreed between the parties that neither of them should appear before and be heard by the arbitrator, on the matters so submitted, and excepted to the decision of the court admitting such evidence.

The defendant objected to any proof of damages resulting from a delay in doing the mason's work, on the grounds, *first*, that the defendant had made no agreement in relation thereto; and *second*, that this was an action merely to set aside the said award, and if the plaintiffs failed to obtain such relief, he could not have any relief in this action and the complaint must be dismissed. The court overruled each objection, and the defendant excepted to such decision.

On the facts so found the court decide that the said award was valid.

That the plaintiffs might have any relief in this action consistent with the case made by the complaint and embraced within the issues.

That the plaintiffs were entitled to a judgment in this action for the sum of \$1,228.10, the aggregate of the said two sums of \$1,178.10 and of \$50.

That the plaintiffs must pay to the defendant his costs of this action, and that a judgment be entered accordingly.

In support of this judgment the following opinion was delivered.

BOSWORTH, J.—The defendant insists that this action is one solely for the purpose of setting aside an award, and that failing in obtaining that relief, the complaint must be dismissed.

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In this I think he is clearly wrong.

The complaint sets out the contract, performance of it by the plaintiffs, and that \$1,850 of the contract price was in arrear and unpaid.

It alleges a breach of duty on the part of the defendant, resulting from his not doing the mason work, so that they could complete their contract by the time it required them to do, and by which they were subjected to losses, and claims damages for that cause to the amount of \$500.

It alleges the submission of some of the matters in controversy to an arbitrator, his award, and seeks to have it declared void, by reason of fraud and undue influence.

It also alleges the performance of extra services, and the furnishing of extra materials, and claims to recover for that \$1,615.70.

It prays for judgment for \$3,965.70, the aggregate of the sums claimed.

The Code allows the plaintiffs to unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal, or equitable, or both, where they all arise out of the same transaction, or transactions connected with the same subject of action.

The causes here united embrace such as were heretofore denominated legal and equitable. They are all connected with the same subject of action. They all arise out of the same transaction.

This provision was designed to enable parties to litigate, and have determined in a single action, every claim to relief, connected with the same subject of action, whether the relief sought was legal, or equitable, or both.

The provision as to the judgment that may be entered, is ample and broad enough to enable the courts to execute this design.

While § 275 provides, that if there be no answer, the relief granted to the plaintiffs, cannot exceed that demanded in his complaint, yet in every other case, where an answer has been interposed, no matter what relief may have been prayed, "the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

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It is clearly consistent with the case made by the complaint, to give the plaintiffs a judgment for such sum as is due to them if the award is held conclusive, or such sum as may be due, if it is avoided and annulled.

The only question about which I have any doubt, relates to the claim for damages resulting from unreasonable delay in doing the mason work: the defendant has not stipulated in respect to this in the contract.

Yet he did the mason work himself, the plaintiffs were unconditionally bound to do the carpenter's work within a specified time. To accomplish this, they must not only provide the materials but employ the necessary hands. It was the legal duty of the defendant to keep the mason's work in such a state of forwardness, as to enable the plaintiffs to perform their contract. For the damages resulting from a clear breach of this duty he should be held liable.

There is much reason to suppose the damages were much more than the sum assessed. But the proof, under the ruling of the court, was slight and not specific, and in assessing them, no liberal conjectures in behalf of the plaintiffs can be indulged: they must be content with such as they have clearly proved.

The plaintiffs having recovered sufficient damages to carry costs, if it was an action merely and nakedly for the recovery of money and seeking no other relief, and having failed to obtain the equitable relief sought or any part of it, it might seem a fair case, for subjecting each party to the payment of his own costs.

There is much reason to apprehend that the defendant has lost a payment of \$207 and some cents, for which he held a receipt, from his confident reliance on the proposition that if the plaintiffs failed to set aside the award they would have no relief, but their complaint must be dismissed.

Notwithstanding the defendant declined the offer made him by the court, to allow the cause to be adjourned to the next day to enable him to prove the receipt, I cannot resist the impression, that in the exercise of the discretion conferred by the Code, I should direct the plaintiffs to pay the defendant's costs.

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— *Leonard*, for defendant and appellant, now insisted that the judgment at special term ought to be reversed, and a judgment ordered for the defendant, dismissing the complaint, with costs of the action and of the appeal; and argued as follows.

I. Evidence of damages sustained by See and Brown, in consequence of the mason work not being done by the defendant as soon as they desired or expected, was inadmissible, and the exception in that respect is well taken. 1. No provision is contained in the contract requiring the defendant to finish the mason work at any specific period. 2. The defendant was entitled to a trial by jury on that issue. The issue relating to the validity of the award is the only one in this action which a judge, sitting without a jury, could properly try. (§§ 253, 254, amended code.) 3. This action is not on the contract, nor is it on the award. This claim for damages does not arise out of the same transaction, and is improperly joined. (§ 167, amended code.) 4. The evidence of damage was too indefinite and uncertain to justify any report in favor of the plaintiffs in that respect.

II. The plaintiffs having brought their action to disaffirm the award, on the ground of fraud, &c., the judge was not authorized to render judgment in favor of the plaintiffs, as upon a complaint brought to recover upon an award acknowledged to be valid and binding on the parties. 1. The complaint asks to set aside the award for fraud, &c., and to recover about \$3,900 under a state of facts, showing that the award is for a sum less than that for which in plain justice and equity it ought to have been made. 2. The judgment rendered required a reconstruction and amendment of the complaint, changing the whole nature of the action. (§§ 171, 173, 275, amended code; *Marquat v. Marquat & wife*, 7 Howard's Pr. R. 417; *Alger v. Scovell*, 5 id. 131.) 3. The course pursued by the court was in violation of the former rules and practice, and operated a surprise upon the defendant. It was the trial of a new and different issue from that made by the pleadings. Upon such an alteration or amendment of the complaint as is necessarily involved in the judgment rendered, the defendant was entitled to a continuance to another term, at the least, in order to procure his witnesses,

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and prepare for trial, or to acquiesce in the amended claim, if he thought proper.

— *Nash*, for plaintiff, *contra*.

I. The questions disposed of by the court were all properly put in issue by the pleadings, and the court was bound in law to decide all these questions in this action. 1. The plaintiff may unite in the same complaint several causes of action, legal or equitable, or both, where they all arise out of the same transaction, or out of contract, express or implied. (Code, § 167.) 2. By section 275, the court may grant—where an answer has been put in—any relief consistent with the case made and embraced within the issue. (Code, §§ 159, 275.) 4. The 167th section of the Code was revised and amended to meet certain decisions in the Supreme Court, relating to this union of legal and equitable actions. (*Otis v. Sill*, 8 Barb. Sup. C. R. 102.) 4. Prior to the introduction of the Code it was not necessary to file a bill, or make a motion for the purpose of getting rid of an award. (*Butler v. The Mayor of the City of New York*, 7 Hill, 331.)

II. The defendant bound the plaintiffs in express terms in the contract to finish his work by a given period. And although the contract is silent as to the defendant's duty in this respect, yet the law implies he shall not interpose any unreasonable delay to the plaintiffs' completing by the time specified. (2 Blackstone's Com. 443.) 1. It is a general principle applicable to all contracts that, whatever may be fairly implied from its terms, is, in judgment of law, contained in it. (*Rogers v. Kneeland*, 10 Wend. 218.)

III. The defendant has committed a breach of this part of the contract to the plaintiffs' damage, and he should be held liable to pay. 1. The defendant claims in his answer to deduct two hundred dollars from the contract price, as damages resulting to him by reason, as he alleges, of the failure of the plaintiffs to complete the work by the time fixed upon. 2. It turned out on the trial that the plaintiffs had sustained damages by being prevented from fulfilling at the time by the defendant. The damages assessed were clearly proven.

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IV. The decision of the court should be affirmed, with costs.

By THE COURT.—We think that all the questions that have been argued before us were rightly decided by the judge at special term; and we deem it unnecessary to state any reasons for our opinion, in addition to those which he has given. He might, with entire propriety, have left the parties to bear separately their own costs, but the mode in which he has exercised his discretion in relation to the costs, is not an error, if an error at all, of which the defendant has any right to complain. The judgment is, therefore, affirmed with costs.

HOLFORD V. ADAMS, and others.

The defendants, an Express Company, received from the agents of the plaintiffs at New Orleans, a package, valued at \$40,000, to be transported and delivered to the plaintiff at New York. By the terms of the receipt given for the package, the defendants were not to be responsible for any loss or damage not arising from their own fraud or gross negligence, or that of their servants; and it was proved that there was the same care in the transportation of all articles without regard to their value. When the package arrived at New York, the defendants refused to deliver it to the plaintiff, unless upon the payment of \$400, being 1 per cent. upon its estimated value.

Held, that, under these circumstances, there was no reason for enhancing the charge for transportation in proportion to the value of the articles transported, and that the charge made was therefore, *prima facie*, unreasonable and extravagant.

Held also, that the charge was not justified by usage, the usage proved not being general, but that of the defendants alone, and there being no proof that it was known to the plaintiff or his agents.

(Before OAKLEY, Ch. J., and EMMET, J.)

November 11; December 10, 1853.

APPEAL by plaintiff from a judgment, at special term, upon exceptions taken at the trial.

The action was for the delivery of personal property, with damages for its detention.

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The complaint charged that Robb & Co., agents of the plaintiff at New Orleans, on the 11th of December, 1851, delivered to the defendants, transacting business under the name of Adams & Co., a package, containing Arkansas bonds of \$1,000 each, with coupons attached, belonging to the plaintiff to be transported by the defendants, by steamer, from New Orleans to the city of New York, and there to be delivered to the plaintiff for a reasonable consideration, to be paid by him to the defendants. That, when the package was so delivered, the agent of the defendants, at New Orleans, signed and delivered a receipt therefor, by which it was stipulated that the defendants should not be responsible for any loss or damage arising from the dangers of the sea, steam or river navigation, or from any cause whatever, unless the same should be proved to have occurred from the fraud or gross negligence of the defendants, their servants, or agents.

The complaint then averred that the defendants had transported the package to New York; that he, the plaintiff, had tendered to them a reasonable sum as a compensation for transporting it, and had demanded its delivery; but that they had refused to deliver and still retained it: and then demanded judgment in the usual form.

The defendants, in their answer, denied that the package containing the bonds was delivered to them, to be transported to New York, and there delivered to the plaintiff for a reasonable consideration. They denied that any receipt was signed or given, as alleged in the complaint; and that the plaintiff had offered to pay to them a reasonable sum as a compensation for transporting the package.

They averred that when the package was delivered to them at New Orleans, Robb & Co. expressly stated that the bonds which it contained were of the value of \$40,000; and that it was then expressly understood and agreed between them and Robb & Co., that, in consideration of their taking charge of, transporting, and delivering the package, the plaintiff would pay to them, upon its delivery to him in New York, one per cent. upon the value of the bonds, as represented and fixed. They then insisted that they were entitled to retain the possession of the bonds until this sum, amounting to \$400, should be

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paid, which they averred was no more than a reasonable and usual compensation for the transportation of similar packages. The reply took issue upon the new allegations in the answer.

The cause was tried before PAINÉ, J., and a jury, in December, 1852. Upon the trial, the counsel for the plaintiff read the following stipulation.

"Whereas this suit has been commenced by the plaintiff to recover the possession of certain bonds and coupons in the complaint described, and damages for the detention thereof, and the defendants' claiming a lien on said bonds and coupons, and a right to detain the same, for their labor and services in the transportation thereof, from New Orleans to the city of New York.

"And whereas the defendants have surrendered up to the plaintiff the possession of said bonds and coupons under the agreement hereinafter set forth.

"Now it is stipulated and agreed between the attorneys for the respective parties, that, upon the trial of this action, the jury shall assess the amount to which the defendants are entitled for such labour and service; and that in case the amount so assessed shall exceed the amount heretofore tendered by the plaintiff, namely, twenty dollars, the defendants shall be entitled to judgment with costs, and the plaintiff shall, upon demand, pay to the defendants such judgment, and the costs and extra allowance of this suit, or return such bonds and coupons to the defendants, to be held by them as a security for the payment thereof, in the same manner, and with the same right of lien, as though they had never parted with the possession thereof.

"Dated, New York, April 8d, 1852.

"TUCKER & CRAPO,

"Att'ys Pltff.

"E. H. OWEN,

"Defts. Att'y."

The counsel for the plaintiff then rested his case.

It was then admitted by the counsel for the defendants, that

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a receipt for the package had been given by their agent at New Orleans, which corresponded in its terms with the statement in the complaint.

The counsel for the plaintiff then admitted, that on the outside of the envelope which contained the bonds was endorsed the words and figures "James Holford, Esq., 49 William street, New York—value \$40,000."

The counsel for the defendants then called

A. L. Stinson, who, being sworn, testified as follows: I am an express man in Adams & Co.'s office; I have been there about three years; I am in the New Orleans department; I have charge of it; the business of Adams & Co. consists in transporting parcels and freight to most parts of the country, and also to California; they also transport valuable packages, which compensates for the small amounts they receive for the carriage of articles of small intrinsic value; in the transportation of parcels, the valuable parcels compensate for transporting less valuable packages, and enable Adams & Co. to transport the less valuable packages cheaper than they otherwise would; we have agencies at the principal points of the Union.

Being asked by the defendants' counsel, what was the usual compensation of Adams & Co., for receiving at New Orleans, and for transporting and delivering in New York packages of value; the question was objected to by the plaintiff's counsel, which objection was overruled by the judge; to which decision of the judge the plaintiff's counsel excepted. The witness answered one per cent. on the value of the package.

The counsel for the defendants then asked the witness:

What is the usual charge of other express men and carriers, for transporting packages of value from New Orleans to New York?

To which question the plaintiff's counsel objected, which objection was overruled; to which decision of the judge the plaintiff's counsel objected.

The witness then answered: One per cent. on the value, that is the usual charge of Adams & Co.; it is my impression that the steam-ships charged at the same rate; it is invariably

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our customary charge; we make special bargains with people sometimes.

Being cross-examined by the plaintiff's counsel, the witness testified:

There are, I think, about sixty Express offices in the city of New York; this number includes all sorts; the local expresses as well as the large ones; I never was employed in the express business before I engaged with Adams & Co.; I have never known Adams & Co. to transport Arkansas bonds before; I don't remember their transporting any bonds except some Texas bonds; I can't say whether they did or not; I don't remember any other bonds than the Texas and Arkansas bonds.

Being asked by plaintiff's counsel what articles of value the defendants have forwarded, he says:

I cannot name any article of value particularly; I cannot name a single parcel; I remember a parcel of gold dust worth \$1,000.

Being again examined in the direct, the witness said:

Packages, when brought to us to be forwarded, are usually sealed; we rely as to the value of the package on the declaration of the party employing us; sometimes he don't declare its value; we then let it go as a common parcel; the charge on these bonds as a common parcel would have been \$1.50; there is no difference between parcels of valuable goods and common articles in the care we take of them; we charge one per cent. on the value over a certain amount; I remember the bill of this parcel; when this package was received it was sealed; we always ask as to the contents.

Being again cross-examined, the witness testified:

We did not insure this parcel; I remember forwarding gold dust; they sometimes transport goods for jewellers, and we generally make a bargain with them as to compensation.

In answer to a question of the judge, the witness said, the receipt produced is in the common form of the receipts we give.

In answer to a question from one of the jury, the witness said, I do not remember that we ever carried anything for Robb or Holford except this one package.

The defendants' counsel then called

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William McGill, who, being sworn, testified : I am an express man in the employ of Adams & Co. ; have been with them twelve months last May ; they are at 59 Broadway ; I am employed in the California department, in the general department. Being asked, what is the usual rate of charge of Adams & Co. for valuable articles from New Orleans to New York, the plaintiff's counsel objected to the question, which objection was overruled by the court, to which decision the plaintiff's counsel excepted. The witness then answered, one per cent.

Being cross-examined by the plaintiff's counsel, the witness testified :

That he had never been in the express business excepting in the employ of the defendants.

The plaintiff's counsel then offered to show that the bonds, to recover which this action is brought, were actually bought by the plaintiff in December, 1851, for \$26,000.

To which offer the defendants' counsel objected, which objection was sustained by the court, to which decision the plaintiff's counsel excepted.

The cause was then summed up by the counsel for defendants and plaintiff.

Whereupon the judge charged the jury, That, if they believed from the evidence that the customary charge by Express offices was one per cent. on valuable articles from New Orleans to New York, they should find for the defendant to that amount on the value of the package, as the same was marked on the package, and declared to the agent in New Orleans when the receipt was taken. That, with regard to the value, the sum of \$40,000, declared to the agent in New Orleans, and marked on the package, and inserted in the receipt, was to be taken as the value.

That, if the jury should think that the \$20, tendered by the plaintiff, was, under the evidence, enough for bringing this package, they would find for the plaintiff.

If not, they would find for defendants what they thought a proper compensation.

To this charge of the judge, and to each and every part thereof, the counsel for the plaintiff excepted.

Whereupon, the jury found a verdict of \$425 for the defendants.

T. Tucker, for the plaintiff, now insisted, that the judgment entered upon the verdict ought to be reversed, the verdict set aside, and a new trial ordered, and rested his argument upon the following points and authorities.

I. The plaintiff had a right to the possession of the bonds in question, upon tendering to the defendants the sum of \$20. 1. The evidence does not present any facts, from which the plaintiff can claim compensation for more than a common parcel. 2. It appears, from the receipt given by the defendants, that they were not responsible for any risk, excepting for their own fraud. 3. It also appears from defendants' receipt, that their charge, in this instance, was not for insurance. 4. It was also proved, that the defendants bestowed no more care on this than they would have given a common parcel. 5. The bonds were not valuable articles, but mere evidences of debt, the destruction of which would not have involved a loss of their nominal amount.

II. There was no commercial or other usage which justified the plaintiff in charging, or obliged the defendant to pay \$400 for the transportation of the package in question. 1. A usage, like that claimed by the defendant, must be so well settled and of so long continuance, as to raise a fair presumption that it was known to both contracting parties, and that their contract was made in reference to it (*Eager v. Atlas Insurance Co.*, 14 Pick. 143; *Rayney v. Vernon*, 9 Carrington & P.). It must be so uniform and universal, that every one in the trade must be taken to know it (*Wood v. Wood*, 1 Carr & Payne, 59; 3 Phil. Ev., Cowen & Hill's Notes, 1422; Story on Contracts, sec. 650, p. 5750, 2d Ed.). Neither of these requisites is supplied by the defendants' testimony. 2. The testimony of the defendants' witnesses was not competent to establish the existence of a usage. The witnesses, two in number, were in the defendants' employ, and had never had any other experience in the Express business. Their experience in the Express business did not exceed one year; and their knowledge as to trans-

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portation of bonds, is confined to one instance. Evidence of a few instances is not sufficient to establish a usage (3 Chitty Com. Law, 45 ; 1 Marsh, 186). Usage must be proved by witnesses, who have had frequent and actual experience of the usage (2 Green's Ev. 208).

III. The defendants' customary charge for transporting packages was not binding upon the plaintiff, it being in evidence that neither he nor his agent had had any prior dealings with defendants, and there being no evidence that the plaintiff knew, or had notice, that there was any customary charge. "For whatever may have been the usage, it can have no effect on a contract unless adopted by the parties" (*Eager v. Atlas Ins. Co.*, 14 Pick. 143 ; *Snowden v. Warner*, 3 Rawle, p. 106). The usages of individuals cannot affect these contracts, unless it appear that the usage was known to the parties with whom they contracted (*Loring v. Gurney*, 5 Pick. 16 ; *Garay v. Lloyd*, 3 Barr. & Cr. 793 ; *Laurence v. Stonington Bank*, 6 Cowen R. 521 ; *Rusforth v. Hadfield*, 7 East. 225 ; *Kinkman v. Shadecross*, 6 T. R. 4 ; 2 Phill. on Ev., p. 37 ; *Lewis v. Marshall*, 13 Lawson (N.S.) ; Duer on Jus. vol. i., pp. 179, 182, 193, 254, in Notes x. to xiii. ; *Winstroop v. Union Ins. Co.*, 2 Wash. C. C. R. 16 ; *Astor v. Union Ins. Co.*, 7 Cowen, 202 ; *Syces v. Bridge*, 2 Doug. 527). There must be a general usage, or universal custom, brought home to the knowledge of the party defendant ; or it must be the special course or habit of dealing with one of the parties, recognised and assented to by the other (Story on Contr., sec. 14 ; *Wood v. Hickock & Harris*, 2 Wend. 501 ; *Child v. Sun Mutual Ins. Co.*

IV. The testimony of A. L. Stinson and W. McGill in relation to the usual rate of charge for valuable articles, was irrelevant, and ought to have been excluded.

V. The judge erred in his charge to the jury, because, 1. If there was a customary charge of one per cent. on valuable articles by the Express office, the plaintiff had no knowledge or notice of it, implied or direct, and is not bound by it. 2. If such a charge were proper for valuable articles, it could not be applied to the transportation of Arkansas bonds, these having no intrinsic value, and being evidences of value merely. The plaintiff's right to recover the amount specified in the bonds

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would still remain, although the bonds were lost or destroyed. The plaintiff could not have recovered the stated or nominal value of such bonds of the defendants, under any circumstances. Such bonds, therefore, are not valuable articles upon which the defendants can charge a per centage. 3. The plaintiff was not excluded from proving the actual value of said bonds by the amount stated in the receipt; there being no evidence of the manner, or by whom such statement was made, or that the plaintiff or his agent ever assented to it. 4. There was no evidence that any declaration whatever was made in New Orleans, by the plaintiff's agent.

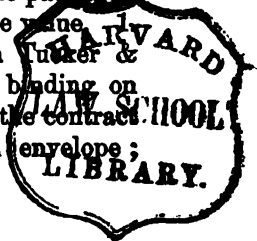
G. F. Betts, for the defendants, *contra*.

I. The charge of the judge was correct, in leaving it to the jury, to determine what was the proper compensation (*Ohitty on Contracts*, p. 547; *Chapman v. De Tastel*, 2 Stark. 295; *Bryan v. Flight*, 5 Mees. & W. 114).

II. It was correctly submitted to the jury that if, from the evidence, they believed that the customary charge by express offices was one per cent. on valuable articles, from New Orleans to New York, they should find for the defendant to that amount (*Hinton v. Locke*, 5 Hill, 437; *Vail v. Rice*, 1 Seld. 155, 158.)

III. The evidence as to the customary charge of Adams & Co. was competent: 1. To show what was a reasonable or proper compensation; that they only asked from the defendants what they asked from all their other customers. 2. It was not offered to prove a local usage of that house, nor was it so submitted to the jury by the court. 3. A general usage having been proved, this evidence could do no harm, being included in the other.

IV. The sum of \$40,000, declared to the agent of Adams & Co., at New Orleans, by Robb & Co., marked on the packages and inserted in the receipt, was to be taken as the value. Robb & Co. were plaintiff's agents (Letter from Tutcher & Crapo). And their declaration and contract are binding on the plaintiff (*Story, Agency*, § 135). 2. This was the contract between consignor and carrier (Endorsement on envelope;



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Smith v. James, 7 Cowen, 328; *Wolfe v. Myers*, 3 Sand. 7-13).

IV. If the bonds had been actually purchased by plaintiff for \$26,000, that was not evidence against the defendants. 1. It was *res inter alios acta*. 2. The plaintiffs were estopped, by their admissions and contract, from showing the value to have been other than \$40,000 (*Truscott v. Denis*, 4 Barb. 498; *Welland Canal Co. v. Hathaway*, 8 Wend. 483).

BY THE COURT. OAKLEY, CH. J.—As no proof was given on the part of the defendants of the express agreement set up in their answer, they were entitled to demand no more than a reasonable compensation for the service which they performed. By the receipt which they gave for the package, they were exempt from the usual liability of common carriers as insurers. They were not responsible for any loss or damage, arising from any other cause than the fraud or gross negligence of themselves, their agents, or servants; and their witnesses proved, that the same care and diligence were bestowed in the transportation of all articles and packages intrusted to their charge, without reference to their value. It is not perceived, therefore, that there was any reason for enhancing the charge for transportation in proportion to the value of the articles transported, and, consequently, the charge which the defendants made, which even exceeds the usual rate of insurance from New Orleans to New York, was apparently unreasonable and extravagant.

We are not, however, to be understood as saying, that the charge made, unreasonable as it seems, may not be sanctioned by usage; but, it is certain, no usage could justify the charge, unless its character were proved to be such, as to warrant the presumption that it was known to both parties, and that their contract was made in reference to its existence; in other words, that it was known to Robb & Co., the agents of the plaintiff, when they delivered the package to the defendants, and that, by their silence at that time, they consented to be bound by it.

Had it been proved that there was a general, uniform, and notorious usage, justifying the charge made by the defendants, the law would have imputed to the plaintiff and his agents a

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knowledge of its existence, but there was no pretence for saying that any such evidence was given. If any usage was proved, it was that of the defendants alone. It was special and particular, not general ; and such being its character, we deem it needless to cite authorities to show that, to render it binding on the plaintiff, his or his agent's actual knowledge of its existence and terms, was necessary to be proved. The evidence, even, of the existence of this limited usage was slight and unsatisfactory ; and there was none whatever from which a jury could be warranted to infer, that its existence was known to the plaintiff or to Robb & Co.

The judge, however, upon the trial, charged the jury, that if they believed from the evidence, that the customary charge by Express offices was one per cent. on valuable articles from New Orleans to New York, they should find for the defendants to that amount, on the value of the package. We think that this charge was erroneous, and that, upon the evidence before the court, the question of usage ought not to have been submitted to the jury at all. We have, however, no right to say that it was not upon this evidence that their verdict was founded, and it must therefore be set aside.

The judgment set aside, and a new trial ordered ; costs to abide the event.

HUNT v. HUDSON RIVER FIRE INSURANCE COMPANY.

A policy of insurance against fire, upon which the action was brought, contained this clause, "camphene, spirit gas, or other burning fluid, when used as a light, subjects the goods, &c., to an additional premium of 10 cents per \$100, and premium for such use must be endorsed in writing upon the policy." The complaint did not aver that camphene, &c., was not used as a light, or, if used, that the premium was endorsed upon the policy.

Held, that it was not necessary to negative in the complaint a breach of this provision—its observance not being necessary to be proved on the trial as one of the facts constituting the cause of action. If broken, the breach was a matter of defence, which, as such, should have been stated in the answer. *Quare*,

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whether the clause ought to be construed as a stipulation against the use of camphene equivalent to a warranty?

It rests wholly in the discretion of the judge who tries the cause, whether he will permit a pleading to be amended upon the trial. The general term will not review his decision upon an exception.

(Before OAKLEY, Ch. J., EMMET and HOFFMAN, J.J.)

November 19; December 10, 1853.

APPEAL by defendants from a judgment at special term, denying a new trial, upon a bill of exceptions.

The action was upon a policy of insurance against fire, executed and delivered by the defendants to the plaintiff upon a stock of goods belonging to him in a store at Racine, in the State of Wisconsin.

The complaint set forth at large the policy, with the terms and conditions annexed; averred the happening of a loss by fire within the term insured, and claimed damages by reason thereof to the amount of \$1,061.09, for which sum, with interest to the 14th of April, 1852, judgment was demanded.

The answer admitted the execution and delivery of the policy; it admitted also that the goods described in the policy, and insured thereby, had been injured and partly destroyed by fire; that the plaintiff had sustained damages thereby; but denied that the proportion of such damages, for which the defendants were liable, amounted to the sum of \$1,061.09, or exceeded the sum of \$582.79, which last sum, the answer averred, that the defendant had tendered and offered to pay to the plaintiff before the commencement of the action. The answer set up as a further defence, that the amount of the loss for which alone the defendants were liable, had been settled by two successive arbitrations at a less sum even than that which the defendants had offered to pay.

The reply denied the tender, the submission to arbitrators, and all other allegations of new matter contained in the answer.

Upon these pleadings the cause was tried before the chief justice and a jury, on the 13th May, 1852; but it is not deemed necessary to state any of the proceedings on the trial, except those to which the exceptions that were taken relate. As soon as the cause had been opened to the jury, the counsel

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for the defendants moved for judgment in their favor, upon the ground, that the complaint did not set forth facts sufficient to constitute a cause of action. The terms annexed to the policy, as set forth in the complaint, contain this provision, "camphene, spirit gas, or burning fluid, when used in stores or warehouses as a light, subjects the goods therein to an additional premium of 10 cents per one hundred dollars, and premium for such use must be endorsed in writing on the policy." The counsel for the defendants insisted that it was a fatal defect in the complaint; that it contained no averment that camphene, spirit gas, or burning fluid, was not used as a light in the store mentioned in the policy, or if used, that premium for such use was endorsed in writing upon the policy. The chief justice denied this motion, and the counsel excepted to the decision.

When the evidence on the part of the plaintiff was closed, the counsel for the defendants offered to read the following cross-interrogatory addressed to a witness examined on the part of the plaintiff, and also the answer of the witness thereto.

Fourth cross-interrogatory. What was the size and number of stories of said store? Of what materials were the same built? Was camphene, or any other, or what burning fluid used for the purpose of lighting said store at night? State the class of articles kept or stored in said store. Answer fully.

The counsel for the plaintiff objected to the reading in evidence of so much of said answer as is responsive to that part of said cross-interrogatory, which is in the words following, to wit: "Was camphene, or any other, and what burning fluid used for the purpose of lighting said store at night?" on the ground that such part of the interrogatory did not relate to any issue in the cause, and also that the defendants had by their answer specifically admitted their liability in this action as insurers, and offered to pay the sum of \$582.79, and had rested their defence solely on the question of the extent and amount of the plaintiff's loss.

Pending the consideration of which objection the counsel for the defendants moved to amend the answer of the defendants, by striking out all admissions of liability of the defendants to the plaintiff, and inserting an allegation that the plaintiff had

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used camphene, spirit gas, or burning fluid, as a means of light in said store or warehouse, without the permission of defendants, and contrary to the conditions of said policy of insurance, which motion was denied by the said chief justice, on the ground that the defendants had admitted a partial right of recovery in this action, and had not applied for leave to amend their answer before the trial, by setting up the alleged ground of defence, so as to give the plaintiff an opportunity of meeting it by adverse proof, and also because such amendment would not be in furtherance of justice, as it appeared by the evidence that the fire did not originate in the plaintiff's store but in an adjoining building, and the counsel for the defendants duly excepted.

The chief justice sustained the objection of the plaintiff's counsel, and refused to allow the counsel for the defendants to read that part of said cross-interrogatory, and the answer thereto, in evidence, to which the objection referred. The counsel for the defendants duly excepted to the decision.

The defence was then abandoned, and the jury, without any summing up by the counsel, found a verdict for the plaintiff for \$1141.46.

G. W. Stevens, for the defendants, now contended that the judgment upon the verdict ought to be reversed and a new trial granted, upon the following grounds.

I. The terms and conditions of insurance annexed to the policy, being referred to in the body of the instrument, form part of it, and have the same force as warranties as they would have had if contained in the body of the policy. (*Roberts v. The Chenango Mut. Ins. Co.*, 3 Hill, 501; *Jennings v. The Chenango Mut. Ins. Co.*, 2 Denio.)

II. The terms of insurance relative to the use of camphene, spirit gas, and burning fluid, amounted to a warranty of a promissory character upon the part of the assured, but although a warranty be promissory, the party insured is bound to a strict performance. (*Egan v. The Mut. Ins. Co. of Albany*, 5 Denio, 326; *Ellis on Insurance*, 28; 1 *Phillips on Insurance*, 3d ed. 416, 469; *Lothian v. Henderson*, 3 B. & P. 515.)

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III. A declaration on a policy of insurance or other contract, must state a full compliance with all warranties and conditions precedent. And if there be a stipulation in a contract that under certain circumstances the defendant shall not be liable, that stipulation must be stated in the declaration, with an averment that the liability of the defendant did not arise out of any of the excepted matters. (2 Phillips on Insurance, 3d ed. 619; *Ferguson v. Cappea*, 6 Harris & J. 394; *Latham v. Rutley*, 2 Barn. & Cres. 20; *Everett v. Desborough*, 5 Bing. 503; Gould's Pleading, 178; 1 Chitty's Pleading, 321.)

IV. The complaint in this cause does not contain an averment of the compliance by the plaintiff with each particular warranty, nor any general averment of a compliance with all the warranties. It is bad in substance, and the motion for judgment on the complaint made at the trial was erroneously denied. (Code of Procedure, sec. 148; *Rayner v. Clark*, 7 Barb. 581.)

V. The admissions of a party only bind him to the extent that they have been acted on by the party setting them up by way of estoppel. (*Merrill v. Tyler*,—In the Court of Appeals, April, 1853.)

VI. The judge erred in denying the motion of the defendant for leave to amend the answer. The amendment of a pleading is matter of right, the discretion of the court is a judicial discretion, and not an arbitrary one, and must be confined to the terms upon which the amendment shall be allowed.

VII. The judge erred in excluding the fourth cross-interrogatory to the witness Runyan. 1. It was strict matter of cross-examination to the fourth and fifth direct interrogatories. 2. An issue as to all the material allegations of the complaint, is raised by the last clause of the answer.

W. Allen Butler, for plaintiff, *contra*.

I. The motion to dismiss the complaint, at the trial, on the ground that it did not state facts sufficient to constitute a cause of action, was properly denied. The fact that the plaintiff had

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not used camphene or burning fluid was, in no sense, one of the facts constituting his cause of action, and only such facts are required to be stated. (Code, § 142, subd. 2.)

II. The evidence with regard to the use of camphene, &c., for light in the insured premises, was properly excluded. 1. There was no issue in the cause to which such evidence applied. The only issues arising on the pleading related to the amount and extent of the plaintiff's loss. The answer admitted a liability on the part of the defendants as insurers to the amount of \$582.79. The evidence of the use of camphene without permission and contrary to the provisions of the policy was offered in bar of any recovery. But this ground of defence was wholly inconsistent with the admissions of the answer, and cannot be implied from any part of it. 2. Even if the liability of defendants had not been admitted by the answer, the use of camphene, &c., as a means of light in the insured premises, would not affect the plaintiff's right of recovery; the provision in the special memorandum respecting camphene, &c., not being a prohibition against its use in any such sense as to make its use a forfeiture of the policy, and the fire not having originated in consequence of its use.

III. The motion to amend the answer at the trial was addressed to the discretion of the court, and its denial was not the subject of exception. (*Roth v. Schloss*, 6 Barb. 308; *Brown v. McCune*, 5 Sandf. 224.)

IV. The judgment appealed from should be affirmed with costs.

By THE COURT. HOFFMAN, J.—The first objection relates to the form of the pleading. It is, that the complaint does not contain facts sufficient to constitute a cause of action, inasmuch as by the conditions of the policy it is provided that camphene, spirit gas, or burning fluid, when used in stores or warehouses, as a light, subjects the goods therein to an additional charge of ten cents per one hundred dollars, and the premium for such use must be endorsed in writing on the policy; and the complaint contains no averment that camphene, spirit gas, or burning fluid, or either of them, were not used as a light in the store or warehouse mentioned in the said policy of insurance,

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or if used, that the premium for such use was endorsed in writing on such policy.

The defendant moved to dismiss the complaint for this alleged defect, and the motion was denied.

We are of opinion, that there was no error in the denial, whether the case is considered under the old rules of pleading, or under the Code.

The complaint has been framed under the precedent in Chitty's Pleadings (vol. 2, p. 536). It contains several averments of a negative character, as that the fire did not take place by means of any invasion, or riot; and Mr. Ellis, in his treatise on fire insurance (Law Library, vol. 4, p. 91), states, that such averments in a declaration are necessary, whether the action is covenant upon a policy under seal, or assumpsit upon one without a seal.

But, in the first place, we consider that such averments contain an anomalous principle in pleading, by introducing allegations which it would be unnecessary to prove. We presume the proffer of evidence, to show that a fire occurred when there was no invasion, would be regarded as frivolous; we are not inclined to go further than precedents compel us.

In the next place there is a marked distinction between the averments in the precedents, and the averment that camphene was not used, insisted upon as necessary in the present case. In those instances the negation is of matters which, if they existed, would show, that there was no subsisting contract at all, or not such a contract as the plaintiff claims upon. Thus, if the loss occurred during an invasion, the contract became annulled; if the policy was made after another insurance upon the property, not mentioned in, or endorsed upon it, the insurance was void from the beginning; and so, if another insurance was made previously, or subsequently, with notice, the company was only responsible for a *pro rata* amount.

In all these cases, the negative allegations are used to make perfect the affirmative proposition of a subsisting contract, within the express conditions of the instrument. They deny the existence of any matter which the instrument itself declares has rendered, or will render it inoperative or qualified.

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The clause in question is distinct from all others in the policy, or memorandum, and is of a peculiar nature.

It is not within the enumeration of trades or business, termed in the memorandum of special rates, as hazardous, or extra hazardous. It is not like gunpowder or saltpetre, expressly prohibited. It is as follows:—"Camphene, spirit gas, or burning fluid, when used in stores and warehouses as a light, subjects the goods therein to an additional charge of ten cents per one hundred dollars, and premium for such use must be endorsed in writing on the policy."

We are not at liberty to substitute the word permission for the word premium in this instrument, although it is highly probable the former word was intended. It cannot be doubted that, if such additional premium has, at any time, been accepted by the assurers, the policy would have remained in force, even if it had been omitted to be endorsed (*Newcastle Fire Office v. Morran*, 3 Dorr. 255).

The case of *Meade v. The N. W. Ins. Co.*, in the Court of Appeals, a statement of which is found in Mr. Selden's Notes, does not, in the first place, contain an express decision; but, in the next place, it is stated, that the clause required expressly the permission of the assurers for the use of spirit gas.

We are of opinion, that there is nothing in the policy which makes the non-user of camphene such an absolute condition or provision, as that the contract cannot be treated as apparently perfect, or sufficiently stated, without an averment denying its having been used.

But, if the view above taken should be erroneous, we consider, next, that the complaint is fully sustained by the rules of pleading established in the Code. The object of the Legislature, in abolishing previous forms of pleading and substituting a complaint, "to set out the facts constituting the cause of action in ordinary language," is, probably, as well attained by pursuing the frame of the stating part of a bill in chancery, as in any other mode (*Fay v. Grimsted*, 10 Barbour, 338). Until the disuse of special replications led to the employment of what was termed the charging part in a bill, nothing could be more simple or logical than the construction of such a pleading.

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It may be laid down as a settled rule that, in such stating part, it would be requisite to allege every affirmative proposition which it would be necessary to prove, in order to establish a right of action and show a ground of relief, and to state nothing more (Willis's Equity Pleading, 19). If a bill were filed in case of a lost policy (as might at any rate have been formerly done), the making of the policy, and setting out an alleged copy fully, or annexing it—with a statement of the fact and mode of loss, to show that the policy covered it, and of the extent of damage, would be all that would be necessary: a violation of any condition of the policy, however absolute, would be left to the defence.

It is a striking fact, that the forms in the old work called *Praxis Almæ Curis* (vol. 1, page 170), omitting, of course, those parts which perform the office of an examination of the defendant, are excellent guides under our present system.

On both grounds, we consider the complaint to be properly framed (Vide *Mann v. Morevoort*, 5 Sand. S. C. Rep., p. 565, 566; and *Catlin v. Gunter*, 1 Duer, 266).

The next objection raised by the bill of exceptions is, that the Chief Justice denied a motion made at the trial, for liberty to strike out the admissions of liability contained in the answer and to insert an averment, that the plaintiff had used camphene, or spirit gas, as a means of light, in the building.

After the decision of this court in *Brown v. McCure* (5 Sandford, 224), and of the Supreme Court in *Ruth v. Schloss* (6 Barbour, 308), it cannot be questioned, that such an application, at such a time, is not of absolute right, but addressed to the discretion of the judge. His decision upon such application is not properly appealable. But, if it were so, we should, without hesitation, affirm it. To allow an amendment in the progress of a trial, which annuls a formal admission on the record, and substitutes a defence altogether new, and which the plaintiff had a right to consider could never be set up, would transcend any looseness of proceeding we are yet apprised of (Vide *Catlin v. Hansen*, 1 Duer, 327, Opinion of Bosworth, J.). We do not mean to say, that if a fraud was first discovered on the eve of, or during a trial, this course

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might not be pursued. We leave such a case to be decided when it arises.

The last objection is, that the judge erred, in excluding the answer of the witness Runyan to the fourth cross-interrogatory.

There is no ground for the proposition, that the cross-interrogatory was warranted by the fourth direct interrogatory. That only required an answer as to the facts, whether a fire did occur at the time alleged ; whether the goods were destroyed, or damaged ; how the fire happened ; and whether by means of invasion or not.

The cross-interrogatory calls for an answer to the question, whether camphene or burning fluid was used for the purpose of lighting the store at night. The matters of inquiry are wholly distinct, and the one question has not let in the other. The judge rejected only the answer to this clause.

The point is then reduced to this—Whether the statement of a witness upon a commission, in answer to an unwarranted question, irrelevant to the whole case made on the pleadings, and inconsistent with the admission on the record of the party obtaining the response, is admissible. We regard the decision rejecting it as clearly correct.

The conclusion is, that the appeal must be dismissed, and the judgment be affirmed, with costs.

WESTFALL V. HUDSON RIVER FIRE INSURANCE CO.

A clause in a policy of insurance against fire, declared that "camphene, &c., when used in stores or warehouses as a light, subjects the goods therein to an additional charge of ten cents per hundred dollars, and premium for such use must be endorsed on the policy."

Held, that these words were not a conditional prohibition of the use of camphene, but merely exempted the insurers from any liability for a loss resulting from such use, unless the additional charge had been paid. They created an exception, not a warranty.

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Held, therefore, that as there was no evidence that the loss resulted from the use of camphene, and there was no other defence than a breach of the alleged warranty, the plaintiff was entitled to judgment.

(Before DUEB, CAMPBELL, and BOSWORTH, J.J.)

December 13, 1853.*

CASE upon a verdict for the plaintiff, subject to the opinion of the court at general term.

The action was on a policy of insurance against fire, on a stock of groceries and liquors, in the store of one Carston Hennings, the assured, in the city of New York. The plaintiff claimed as the assignee of Hennings.

The execution and delivery of the policy, and the happening of a loss, were admitted, but the principal defence set up in the answer, was, that the assured had used camphene as a light in his store; and that this use was a breach of a warranty contained in the terms of insurance annexed to the policy, and was, therefore, a bar to a recovery.

The clause relied on as a warranty is in these words:—"Camphene, spirit gas, or burning fluid, when used in stores or warehouses as a light, subjects the goods therein to an additional charge of ten cents per \$100, and premium for such use must be endorsed in writing upon the policy." The cause was tried before Mr. Justice BOSWORTH and a jury, on the 27th of April, 1854.

On the trial, evidence was given on the part of the defendants to show that Hennings had used camphene as a light during the whole time that the policy was running. No premium for such use was endorsed upon the policy, or shown to have been paid. Upon this evidence the counsel for the defendants moved that the complaint should be dismissed. The judge denied the motion, and the counsel excepted to the decision.

The jury, under the direction of the court, found a verdict for the amount of the loss proved, subject to the opinion of the

* Although this case was heard in December, it was not in fact decided until the following April term; but it is deemed proper to publish it in connexion with the preceding case, as it contains the final decision of the court, upon a conference of all the judges, upon the question, whether the clause relative to the use of camphene imports a warranty.

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court at general term, upon the question raised by the exception of the counsel for the defendants.

The case upon the exception was now heard

W. Stevens, for the defendants, argued the following points.

I. The terms and conditions of insurance annexed to the policy, being referred to in the body of the instrument, form part of it, and have the same force and effect as warranties as they would have had if contained in the body of the policy. (*Roberts v. The Chenango Mut. Ins. Co.*, 3 Hill, 501; *Burritt v. The Saratoga Mut. Ins. Co.*, 5 Hill, 188; *Gates v. The Madison Mut. Ins. Co.*, 2 Coms. 43.)

II. The terms of insurance relative to the use of camphene, spirit gas, and burning fluid, amounted to a warranty of a promissory character upon the part of the assured; but, although a warranty be promissory, the party insured is bound to a strict performance. (*Lothian v. Henderson*, 3 B. & P. 515; *Egan v. The Mut. Ins. Co. of Albany*, 5 Denio, 326; *Ellis on Insurance*, 28; 1 *Phillips on Insurance*, 8d ed. 416, 469.)

III. Hennings, the insured, violated the express condition of the policy, by the use of camphene as a means of light, without the payment of additional premium, or the endorsement of permission for such use on the policy. The policy was, therefore, absolutely void. (*Mead v. The North Western Ins. Co.* in Court of Appeals, Dec. 1852; 2 Denio, p. 45.)

H. S. Dodge, contra.

I. The only question in the case is that presented by the second objection to the recovery, namely, the use of camphene, and the motion on this ground was properly overruled, because the question did not arise. 1. The proof did not show that the article burnt in the lamp was "camphene, spirit gas, or burning fluid," so as to authorize the court to take that question from the jury. 2. Nor did it appear that the material was used as a light at the time of the fire.

II. There is no provision in the policy which furnishes a foundation for the defence set up in the answer. That is based upon the mistaken supposition that the stipulations in the policy

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provides for the case. 1. The provisions do not apply to insurances of goods, but only of buildings, the words, "the above-mentioned premises or any part thereof," mean the "insured premises," which is the legal and natural meaning. The case of goods insured is provided for in the conditions. All the reported cases on these provisions arose on policies upon the building. (Vide *Langdon v. Equitable Ins. Co.*, 1 Hall, 226; S. C. 6 Wend. 623; *O'Neil v. Buffalo Ins. Co.*, 3 Coms. 122; *Gates v. Madison Ins. Co.*, 1 Selden, 469.) 2. If they do apply, the storing or keeping of camphene, &c., is not prohibited. Camphene, spirit gas, or "burning fluid," are neither of them in the list of hazardous or extra-hazardous goods, nor in the memorandum of special rates. Spirituous liquors are, but this policy permits them. 3. The provision as to "camphene, &c.," merely adds additional premium when these articles are used as a light in stores and warehouses. But no part of the policy requires previous permission to use "camphene, &c." Nor was it ever agreed that an unauthorized use should avoid the policy, or suspend its operation during the use of the light. 4. There is no penalty attached to the failure to procure the assent of the company to such use. The only consequence would be that the assured would be liable for the additional premium, if unpaid, unless it were proven that such use changed or increased the risk under the first condition. 5. No such proof was offered in this case, nor was it shown that the additional premium had not been included in that paid, nor that the light was used at the time of the fire. Judgment should be ordered for the plaintiff upon the verdict.

By THE COURT. DUER, J.—In our opinion, there is in this case only a single question which is necessary to be considered. The plaintiff is clearly entitled to retain the verdict, unless the clause in the conditions annexed to the policy relative to the use of camphene, must be construed as a warranty. If such must be its construction, there was sufficient evidence of its breach to render it necessary that the question should have been submitted to the jury; and as it was not thus submitted, there must be a new trial. If there was no such warranty, the plaintiff must have judgment upon the verdict.

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The question whether a particular provision in a policy shall, or shall not, be construed as a warranty, and the effect of the construction when adopted, are exactly the same, whether the insurance be against fire upon land, or against marine risks—and we deem it needless to cite authorities to prove that such is the settled law. In neither case, is the policy usually signed by the assured; yet, in both, a provision that a particular state of facts shall or shall not exist, or a particular act shall or shall not be performed, is construed as a positive stipulation by the assured that the provision shall be complied with. It therefore constitutes a warranty, the breach of which, although wholly unconnected with the loss that is claimed, by avoiding the contract, discharges the insurer.

Nor in the case of an insurance against fire, is it of any consequence whether the provision relied on as a warranty, be found in the policy itself, or in the terms and conditions which are annexed; since, by an express clause in the policy, the rights and obligations of the parties as much depend upon these terms and conditions as upon the special provisions in the body of the instrument. They are, therefore, an integral and essential part of the contract.

The provision we are now required to construe, and which is found in the terms annexed to the policy, is in these words;

“Camphene, spirit gas, or burning fluid, when used in stores or warehouses, as a light, subjects the goods therein to an additional charge of 10c. per \$100, and premium for such use must be endorsed, in writing, upon the policy.”

In considering this case, our first impression undoubtedly was, that this clause amounted to a conditional prohibition of the use of camphene as a light, and must, therefore, be construed as a warranty by the assured against such use, unless the prescribed conditions should be complied with; but upon further reflection, we became satisfied that such is not the necessary construction of the words of the clause, and that they may be very fairly and reasonably understood in a very different sense. The words, we are now satisfied, are ambiguous; they may mean that if camphene shall be used, the company shall not be liable for a loss resulting from its use, unless the additional premium shall be paid, and its payment be endorsed;

or, that unless these conditions are complied with, camphene shall not be used at all. Upon the first construction, the only effect of the clause is to except a particular risk, the use of camphene as a light, from the general risks of the policy. Upon the second, the effect is to create a warranty. If we adopt the first, as there was no evidence that the loss resulted from the use of camphene, the verdict must stand. If the second, as there was evidence that by the use of camphene the warranty was broken, there must be a new trial.

The inquiry, therefore, now is, which is the construction, which as probably most consonant with the intention of the parties, judging of the intent by the settled rules of interpretation, it is the duty of the court to adopt.

No rule, in the interpretation of a policy, is more fully established, or more imperative and controlling, than that which declares that, in all cases, it must be liberally construed in favor of the assured, so as not to defeat without a plain necessity, his claim to the indemnity, which, in making the insurance, it was his object to secure. When the words are without violence susceptible of two interpretations, that which will sustain his claim and cover the loss, must in preference be adopted. (*Pelly v. Royal Ex. Assur. Co.*, 1 Burr, 341, 348; *Blackett v. Royal Ex. Assur. Co.*, 2 Crompt. & Jar. 244; *Yeaton v. Fry*, 5 Cranch, 355; *Palmer v. Warden*, 1 Story, 360.) Nor is this an arbitrary rule of construction. On the contrary, it follows from the very nature of an insurance, as a contract of indemnity, and has been adopted and confirmed from the conviction that the construction to which it leads is probably that which the real intention of the parties requires shall be followed. (*Dorr v. Whithen*, 1 Hall Sup. Ct. R. 174; Opinion of Jones, Ch. J.)

It is evident, it seems to us, that this general rule applies with a peculiar force, when the court is required to say, that the words of a disputed clause must be construed as a warranty.

The construction that our own, as well as the English courts, have unfortunately given to a warranty, is exceedingly strict, but it is too well established to be now changed by any exercise of judicial discretion. It is not enough, that a provision construed as a warranty in its spirit and substance is fulfilled; its

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terms must be literally complied with. Its breach is not excused by showing that it was the result, not of choice but of accident or necessity; that it worked no prejudice to the insurer, and not only had no influence on the loss that is claimed, but had no tendency to increase, or even vary, the risks that were meant to be assumed. If a breach, however slight, and confessedly immaterial, is proved, the entire contract is at an end, the assured loses his indemnity, and the insurer retains his premium, and rejoices in his discharge. When the provision that is claimed to be a warranty is, at all, ambiguous, it seems to us, it is a reasonable presumption that the assured never meant to bind himself by a stipulation thus rigidly construed, and we cannot but think, that this presumption, unless the words used are such as plainly, if not necessarily to exclude it, ought to prevail. Certainly, it cannot be said that this presumption is plainly excluded by the words of the clause that is now under consideration. On the contrary, the words, "*camphene, &c.*," "*when used, &c.*," imply the possibility of its future use, and those which follow, may well be construed as a mere declaration of the consequences of such use, not as a conditional prohibition; as meaning only that unless the premium shall be paid, the particular risk will not be assumed. They may well be construed, therefore, as an exception of a loss resulting from the risk, instead of a warranty that the fact creating the risk shall not exist.

The terms of the clause which immediately precedes that we are considering, strengthen our belief that the construction we have stated is reasonable in itself, and, probably, expresses the true intention of the parties.

The terms of this clause are, that "saltpetre, gunpowder, and cotton are expressly prohibited from being deposited, stored, &c., in any building, &c., containing any goods or merchandise insured by this policy, unless by special consent in writing." And it is difficult to account for the immediate and marked change of phraseology in the next clause, upon any other supposition than that of a change of intention. If the use of camphene was meant to be prohibited in the same sense as the storage of gunpowder, we can discover no reason why the prohibition was not express, in the one case, as well as in the

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other. Had the intent been the same, it seems to us that such would have been the language; whereas if the intent in the second clause was to create an exception and not a warranty, the alteration in the mode of expression was proper and necessary.

In the recent case in the Court of Appeals, to which we were referred on the argument, in which the clause relative to the use of camphene was held to be a warranty, we have ascertained that the words, in the last member of the clause, were materially different. They were, that "permission" for such use (*i. e.* of camphene) must be endorsed upon the policy—and necessarily implied that without a permission so evidenced, the use was forbidden. The words "premium for such use, &c.," carry with them no such implication; but as we have already shown, taken in connexion with those that precede them, are satisfied by holding them to mean, that unless the required premium should be paid and endorsed, the risk would not be assumed. We therefore think that we are bound to say that they created an exception, and not a warranty, and that the plaintiff is entitled to our judgment.

Judgment for plaintiff, with costs.

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Where goods purchased by, and delivered to A for his own use and as his own property, are, by his direction, charged to B, the transaction is within the mischief that the statute of frauds was designed to prevent; and in an action against B, the parole evidence against him, as purchaser, ought to be free from any suspicion.

A recovery in such an action ought not to be permitted when A is the only witness on behalf of the seller of the goods, and is contradicted by other witnesses.

Nor ought a recovery to be permitted, where the complaint avers that the goods were sold and delivered to B.

The authority of A to make the purchase in the name of B, and the delivery of the goods to him, with the consent of B, are material and issuable facts, which

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the plaintiff is bound to prove upon the trial, and is, therefore, bound to aver in the complaint.

Upon these grounds, report of a referee set aside, and order of reference vacated.

(Before OAKLEY, Ch. J., EMMET and HOFFMAN, J.J.)

November 18; December 10, 1853.

APPEAL, by the defendant, from an order at special term, setting aside the report of a referee in favor of the plaintiff.

The action was for goods sold and delivered to the defendant, and work performed for him, and at his request. The answer merely took issue on the allegations in the complaint.

The cause was, on January 10th, 1852, referred to Michael Ulshoeffer, as sole referee, before whom, on the trial, the following testimony was given :

Mary Ann Nidds, sworn for the plaintiffs, testified : I know Jeremiah Lounsberry, the gentleman present ; I did not know him at the time I purchased the goods in question ; I do not know the plaintiffs personally ; their store is in Pearl street, opposite William street ; I went there, and saw the man present here, in May a year ago in 1850 ; I knew the defendant ; I purchased the goods amounting to one hundred dollars or a little over ; they were carpets and three door mats ; they were for the house in which I resided, No. 111 Fourth Avenue ; the arrangement was this, I was to furnish the house, and my son-in-law, Mr. Simpson, was to board with me, and to pay every three months, but he did not pay, and I could not get along ; I wanted money, and I went to borrow it of the defendant ; I asked the defendant to lend me one hundred dollars ; he said he could not that day, that he had paid away his money ; I told him I was sorry, as I wanted some very much, and told him what I wanted to do with the money, and he told me that he could do the same thing for me as letting me have the money ; he told me he regretted he had not the money to lend me, and asked me what I wanted it for ; I told him I wanted it to purchase carpets, that my husband had not the money for me, and that I did not want my husband to know that I had applied to borrow it ; Warren Leland then said he could arrange it just as well for me as to lend me the money ; he asked me if I knew

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Smith & Lounsberry; I said I did not; he told me where their store was, and to go down to their store in Pearl street, opposite William street, and see if they had the carpets I wanted, and, if so, to purchase what I wanted, and tell Smith & Lounsberry to charge the carpets to him; I then told him I did not wish my husband or his brother to know this, and I stated to him that I would pay him as soon as I could; I expected some money soon; he replied it will be all right; I went to the store alone, I had never been there before; I asked to look at some carpet, and found some that suited me; (defendant said to me, go down to the store, and get what you want, and tell them to charge it to Warren Leland; I said to him I did not want my husband or his brother to know it,) but would not purchase until I could bring my daughter down with me to see them; I asked the gentleman in the store whether he knew Mr. Warren Leland; he said, he did, very well; I told him the carpets I wished to purchase were to be charged to Mr. Leland; he said, very well; I then went home and wrote Mr. Leland that I had seen carpets that suited me; to this letter I received no answer; I wrote it only, not that I had promised to do so, but because I thought it was but civil to write to him informing him of it; after that I went down to the store with my daughter, and selected the carpets with her; I saw a gentleman at the desk, and asked him if he knew Mr. Warren Leland, he said, very well indeed; I then said I wanted to purchase on Mr. Warren Leland's account, and wanted them charged to Mr. Warren Leland; the gentleman said it was all right; I purchased the goods, they were made up and sent home.

The bill produced, and shown her—the witness testified, that is the bill.

The bill amounted to \$100.⁰⁰/₁₀₀.

Cross-examination.—I have been shown the bill of these goods before, some time last spring, the spring after they had been purchased; a young man from the plaintiffs' store brought the bill to me, and said, here is a bill of carpeting got by you from the plaintiffs; I said to him take that bill back; I asked him if it had been presented to Mr. Leland; he said he did not know, that the defendant was abroad or in California; I do not

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remember the bill being presented again until the gentleman present called with it; I think it was a brother of the one present, Mr. Lounsberry, a brother of one of the plaintiffs' firm; he said they had sent to Mr. Leland, and he would have nothing to do with it, and then said you have bought the goods on false pretences; they made no threats to me; I said I would go and see him myself, and have the matter explained properly; I went to see Mr. Leland, the defendant, and did see him; these were the only times the bill was presented to me, as far as I remember.

Q. What conversation passed between you at that time?

Objected to; objection sustained. Defendant's counsel excepts.

Q. At the first interview you had with defendant, when you went to borrow money, did not defendant say, upon the plaintiffs being named, "you go to them (the plaintiffs), and refer to me, and they will sell you the carpets, I presume?"

A. No, he did not say so.

Q. Did he not say, "Go there, and refer to me?"

A. No, he did not.

Q. Did you not state to me (Cyrus Lawton, counsel for defendant), in Twelfth street, that the defendant did not authorize you to have the goods charged to him?

A. I did not; I think I remember the conversation as near as possible; I do not remember saying anything of that kind; when I conversed with you, you said you would see the defendant, and advise him to settle the matter; I don't remember anything more; I went to Mr. Leland's in the morning about 9 o'clock, and he told me where the plaintiffs' store was, and I went directly there, and looked at some carpets, and found they would suit me; I then went home to the Fourth Avenue, and wrote a note to Mr. Leland, but got no answer; my daughter wrote the note as I told her.

Q. Did you not purchase carpets of another person, and tell them to charge it to Warren Leland, and did not they refuse to deliver them to you because defendant had refused?

A. Never: I will tell you what you refer to; when I went back to purchase the carpets of Smith & Lounsberry, I by mistake got into the adjoining store to that of Smith & Lounsberry.

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ry ; I asked the clerk if this was Smith & Lounsberry's store ; he said it was ; I went up stairs with the clerk, and selected the carpets and rugs, came down, saw a gentleman at the desk, and asked him if he knew Mr. Warren Leland ; he said he did ; I told him I wanted to purchase goods on Warren Leland's account, to be charged to him ; he said it was all right ; I then left without discovering my mistake ; the carpet was made and sent to my house with the bill, subject to my daughter's approval of the carpet ; she did not like it ; I then discovered the mistake, and refused to let him leave the goods ; I told them that they had imposed upon me by representing themselves to be Smith and Lounsberry, and I would not receive their goods ; in a few days after this my daughter and myself went down to Smith & Lounsberry's, and made our selections, and we then told how we had been treated by the people next door.

FOR THE DEFENCE.

Jeremiah Lounsberry was sworn and testified ; I am a clerk for the plaintiffs ; I was at the time (May and June, 1850), the carpet in question was sold ; Mrs. Nidds's interview was with Mr. Smith, one of the plaintiffs ; I know that the note was written at the time in the store to Mr. Leland, which was sent by a porter ; we were not in the habit of selling goods, and charging them to other people without an order, and we would not in the usual course of business have delivered the goods without seeing the defendant ; it was in the afternoon, and the carpet was lying on the walk when we sent to Mr. Leland ; I was in the store when Mrs. Nidds first came there ; her interview was with Mr. Smith, one of the plaintiffs ; Mr. Smith and Mrs. Nidds went up stairs together to look at carpets ; when they came back, they went to the desk, and Mrs. Nidds wrote a letter to Warren Leland, and the porter took it, and was told to make haste back ; I never before the goods were delivered went to Mr. Leland's to ask if it was right to charge Warren Leland for the goods sold to Mrs. Nidds ; I did not go to Clinton Hall in the spring or summer of 1850, to ask any questions in relation to the matter ; I went to Clinton Hall in the fall of 1850, to collect this bill, and was then informed that Warren Leland

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was out of town ; the bill was not made out or presented until the fall of 1850 ; Mrs. Nidds the morning she and her daughter came and selected the carpet, stated the people next door had deceived her by inducing her to believe that their store was ours.

Simeon Leland, sworn for defendant, testified : I formerly kept the Clinton hotel, my brothers keep it now ; the defendant is one of the proprietors now ; I recollect in May or June, the circumstance of the carpet sold to Mrs. Nidds by the plaintiff ; I am frequently in at the Clinton hotel, and when there assist them ; I reside at New Rochelle, and when in the city am at the Clinton hotel ; I know the plaintiffs, and have for a long time ; we were in the habit of referring people there to buy carpets ; there was a kind of understanding ; we referred people stopping at our house, and to them we were not to be responsible, and nobody ever thought of such a thing ; I was at the hotel in the last of May or first of June, 1850, when a porter of the plaintiffs came, and wanted to know if it was all right to deliver the carpets and things to Mrs. Nidds, which she wanted. I told him no, and not to deliver it, for if Warren wanted to assist her he would have given her the money, and the man went away, and very shortly returned with Mr. Lounsberry, here present, and I told them the same thing ; they had a bill of the carpet, but said it had not been delivered, and they hurried away to stop its being delivered ; Warren Leland was not in town, and they did not see him, he had left a day or two before, and gone to Cleveland, Ohio ; he was gone from six to ten days, on business ; I recollect the matter perfectly well ; the defendant went to California in December, 1848 ; he was here in 1850 ; he was home in November, 1850 ; and again went to California ; my brother Charles was present at the conversation referred to.

Charles Leland, sworn for defendant, testified : I am one of the proprietors of the Clinton hotel ; I recollect the plaintiff's porter and clerk calling at the office of the hotel for Warren Leland, and hearing conversation about carpeting, with Simeon ; Warren had been away for six or seven days ; I heard my

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brother Simeon talk rather short to the man who came for payment of the bill; this was, say, June, 1850; the bill was taken away, because my brother Simeon said he did not know any thing about it; I recollect saying to my brother Simeon, "Don't be so hasty, it may be right after all;" the bill came in for payment, as I supposed; I was only present at the interview; I think two persons came.

C. C. Wilson, sworn for defendant, testified: I know the plaintiffs, and was engaged in business next door to them in 1850; Mrs. Nidds called at our store in the latter part of May or June, 1850, and selected some carpets; she said, "Send the bill to Mr. Leland, at the Clinton hotel;" she gave the address of the defendant, and where to send the carpet; she said nothing about Smith & Lounsberry; we sent to Mr. Leland, the defendant; I went and saw him, and we then sold Mrs. Nidds the carpet on her own credit, and had them made up and sent to her house with the bill of purchase, and when she saw the man with the bill, she shut the door, and would not let the carpet or the man into the house.

Our store was 450 Pearl street, and the plaintiffs' was No. 448 Pearl street; we measured the rooms of Mrs. Nidds, and made the carpet, and we sent it two days after the purchase; she said nothing about the plaintiffs, and had not then purchased any carpet of them; it was in or during these two days that I had seen Mr. Warren Leland; I had no authority to charge the carpet to the defendant, either from him or Mrs. Nidds, and did not do so: I am not in the carpet business now.

On cross-examination, witness testified: My store was next door to Smith & Lounsberry; we did not send the carpet to her the day she engaged it, but a day or two afterwards; I saw Warren Leland before I sent it to her; a clerk of ours, Mr. Merrill, first saw Mrs. Nidds, and went up stairs with her to select the carpet; Merrill came into the store with her; I did not have any conversation with her until she came down stairs and selected the carpet; after she sent the carpet back, she said we had deceived her, that she went to purchase of S. & L., and that we had represented another as theirs.

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Cyrus Lanston, sworn for the defendant, testified : After this suit was brought, at the request of the defendant, I called on Mrs. Nidds, to inquire of her what the facts were, and she stated that she wanted some carpets, and went to defendant to borrow money to buy them ; he declined, but told her she had better go to Smith & Lounsberry, and refer to him, and he had no doubt they would sell her the carpet on time ; I asked her if the defendant had authorized her to have the goods charged to him ; she said, "No, but she thought she might do so ;" I then told her, if he did not authorize her to have the goods charged to him, I did not see how they could recover and make him pay for them, and that I should advise Mr. Leland to defend the suit ; she said she hoped I would not, but would try to get the defendant to settle it, for she said the plaintiffs had been there, and had threatened to have her arrested for getting goods under false pretences, and to get her in difficulty, that she had not the money, and she was afraid she would get into trouble.

Upon his cross-examination, this witness testified : The idea I wished to convey to her was, that he did not use the word "charge ;" I then told her, if he had not used the word "charge," the plaintiff could not recover.

The parties having rested and summed up, the referee afterwards made his report in favor of the plaintiff, for \$101.82.

The decision of the referee not being satisfactory to the defendant, he obtained an order for a review of the testimony, &c., which was heard before Mr. Justice Paine, at a special term, who, having heard counsel for the respective parties, on the 15th March, 1853, made an order setting aside the report of the referee, and gave the following opinion.

PAINÉ, J.—This is a perplexing case to dispose of, as it is clearly within the spirit and mischief of the statute of frauds, and yet, perhaps, has been taken out of it by the course of decisions. But I think, that in looking at the evidence in such a case, we should still be governed by the spirit of the statute,

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and its acknowledged object; and, that where there is the same inducement to fraud and perjury as it contemplates, the parole evidence should be free from suspicion.

The only proof in this case of a promise of a third person to pay a debt, is the testimony of the debtor. But she is distinctly contradicted by a respectable witness, upon the point upon which the case turns. She says the defendant told her to tell the plaintiffs to charge the goods to him, and that she did so. On her cross-examination she is asked, "Did you not state to me, Cyrus Lawton, that the defendant did not authorize you to have the goods charged to him?" Her answer was, "I did not." Mr. Lawton's testimony upon that point is this, "I asked her, if the defendant had authorized her to buy the goods, and have them charged to him; she said no, but she thought she might do so." He also states some other facts, which affect her credibility.

As the plaintiff is always bound to make out his case by satisfactory evidence, that burden being upon him, I am obliged to say in this case, that I do not think he has done so.

I will state another ground upon which I am inclined to think the plaintiffs cannot recover; although I do not place the decision on that ground. Admitting that Mrs. Nidds has proved, that she was the agent of the defendant to make a promise for him, in a transaction where he was not principal, and had no earthly interest, and where she alone was principal, and had all the interest, admitting that this may properly be called an agency, and that therefore the defendant was bound by the promise she made for him, yet I see no proof in the case, that she was constituted his agent to accept and receive the goods for him; and I do not think that in such a case we are to strain the evidence for the purpose of presuming or implying an agency for that purpose. The declaration in this case avers a sale and delivery to the defendant. This may be the right form of declaring, although I think that principle and the weight of authority are against it. Where the whole credit is given to the defendant, as it must be, and it is so proved, there is sound reason to say, that the goods are sold to the defendant. But where in such case the goods are avowedly bought for a third person, and for her use, in the absence of the

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defendant, and without any authority being proved to deliver them to her; and where they are proved to have been delivered to such third person, for her exclusive use, with the full understanding that she is never to deliver them to him, but is to keep them herself, and for herself, I am unable to perceive, how the averment in the declaration, that they were delivered to the defendant, is at all supported. The courts have so far dispensed with the statute, as to have settled, that the authority of an agent need not be in writing, although his execution of it must be; but surely we are not to go further, and say, that the authority need not be expressly proved, but may be implied without proof.

The statute requires, that where the price of the goods is over fifty dollars, the buyer shall accept and receive a part of the goods, or pay part of the purchase money. The buyer, in this case, both by the averments of the declaration and the necessary conclusion of law (if the defendant is to be held liable) was the defendant. But the goods were never accepted and received by him, nor by any one proved to have been his agent for that purpose.

Still, I am unwilling to place my decision upon this ground, when I think the other less free from question.

J. W. Gilbert, for the plaintiff, now moved that the order made at special term should be reversed and judgment be entered for the plaintiffs, upon the report of the referee. He relied upon the following points and authorities.

I. The testimony of Mrs. Nidds proves a sale and delivery of the goods in question to the defendant—by showing: 1. An authority to make the purchase for the defendant. 2. That such purchase was made. 3. A delivery of the goods conformably to her directions. 4. Mrs. Nidds was a competent witness to prove her authority and the other facts.

II. An authority to purchase necessarily includes an authority to receive the thing purchased.

III. The case is not within the statute of frauds.

IV. The testimony of Mr. Lawton is insufficient to impeach Mrs. Nidds. 1. An impeachment cannot be made out by a

single witness. 2. The reply of Mrs. Nidds to the question put by Mr. Lawton may be explained upon the supposition that she did not comprehend the purport, or effect of the question, and it is the duty of the court so to reconcile the testimony. 3. Upon the whole testimony of Mr. Lawton, it is doubtful what language he employed in putting the question, and Mrs. Nidds' reply being merely "No," it would be harsh to conclude that she intended to make a contradictory statement.

V. At most, the alleged contradiction of Mrs. Nidds merely affected her credibility. The referee sustained her, and his decision is final and conclusive. (5 Sandf. 190.)

VI. The decision of a referee, upon questions of fact, will not be set aside, unless it be manifestly against the evidence.

G. Lawton, contra.

I. The complaint in this action is for goods sold and delivered by the plaintiffs to the defendant, and there is no evidence in the case either of a sale or delivery to the defendant. (Code, § 142, 171; 1 Chitty's P. C. 346.)

II. This case is clearly within the statute of frauds, as held by his honor Justice Paine. The undertaking, if any, was collateral, and there is no evidence that the goods were charged to defendant. (2d Term R. 80; 8 Johns. R. 39; *Gallagher v. Bunnell*, 6 Cow. R. 346.)

III. An authority to purchase is not an authority to receive the goods, and any authority to act for another must be strictly pursued, and when proven by parol must be strictly construed. There is no pretence of an authority for the work and labor. (Dunlap's Paley's Agency, 202.)

IV. The plaintiffs' case rests solely on the testimony of Mrs. Nidds, which is contradicted and her evidence impeached, and is entirely unworthy of credit. (1 Stark, Ev. 582 & 3; 2d Cow. Treatise, 983 to 985; 8 Cow. 60.)

V. Mrs. Nidds was not a competent witness to prove the defendant's liability; she was not the defendant's agent, she says she was to buy for herself, but she does not say that the defendant promised to pay for the goods, nor did the defendant do any act from which the plaintiffs could infer or be led to

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believe that he intended to pay for them. (*Shiras v. Morris*, 8 Cow. 60; 1st Stark, Ev. 582 & 3; *Filmer v. Flynn*, 4 Nevile and Manning, 559; 2d Cow. Treat. 983-5.)

VI. The plaintiffs had notice not to deliver the goods to Mrs. Nidds before they delivered them, which was a full revocation of all authority to purchase on the credit of the defendant, if any had been given.

VII. The referee erred in not allowing the testimony as to what passed between Mrs. Nidds and the defendant at the second interview. The circumstances were peculiar, and the largest liberty ought to have been allowed on cross-examination.

VIII. The equities of this case are all with the defendant. The plaintiffs and the Messrs. Leland had an understanding as to referring people to their store to buy carpets, a part of which was that they were in no case to be held responsible.

IX. Upon the whole case it is clear that a gross fraud is attempted to be perpetrated upon the defendant in this action. The plaintiffs ought not to recover, and the order appealed from should be affirmed with costs.

By THE COURT.—We are of opinion that the order made by our brother Paine, setting aside the report of the referee, must be affirmed, with costs, and this, not only upon the ground upon which he has rested his decision, but also upon that in respect to which he has merely stated the inclination of his opinion. The Code requires that all the facts constituting the cause of action, must be set forth in the complaint, and the definition embraces all material and issuable facts; all that the plaintiff must prove upon the trial to entitle him to recover. When goods sold, are delivered to a third person for the exclusive use of such person, his authority to receive them, and their delivery to him, are material and issuable facts, which the plaintiff, in an action against the purchaser, is bound to prove upon the trial, and is therefore bound to aver in the complaint. Here the complaint neither avers the authority of Mrs. Nidds to receive the goods, nor their delivery to her, and the evidence bearing upon these facts which was given before the referee, is not only most unsatisfactory in itself, but under the complaint

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as framed, ought not to have been admitted. It is true that the delivery of goods sold to a third person for the use of such person, under an authority from the purchaser, is, in judgment of law, a delivery to such purchaser; but it is so, not as a fact, but as a conclusion of law, and we have repeatedly held that they are the facts from which the proper legal conclusions may be drawn, and not the conclusions themselves, that must be stated in the complaint.

We do not think that we are concluded by the finding of the referee upon the main question, whether Mrs. Nidds was authorized by the defendant to purchase the goods in his name. Her testimony is not merely suspicious in itself, but she was materially contradicted by the witness Wilson, as well as by Mr. Lawton. Giving to the finding of the referee the same effect as to the verdict of a jury, we think it may be properly set aside, as against the weight of evidence.

Order appealed from affirmed, with costs, and rule for a reference vacated.

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A person who transfers a promissory note by delivery, without endorsement, is not an assignor within the meaning of the Code, so that when he has been examined as a witness for the plaintiff, the defendant may offer himself as a witness to the same matter in his own behalf. (Code, § 399.)

Whether an endorser is an assignor within the meaning of the Code, *dubitat*.

The defence of usury cannot be admitted under a general allegation in the answer, not stating the terms of the usurious agreement.

The refusal of the judge upon the trial to permit the answer to be amended, so as to let in the defence, is not a ground of exception, nor ought such an amendment to be allowed.

(Before OAKLEY, Ch. J., EMMET and HOFFMAN, J.J.)

November 21; December 10.

APPEAL from a judgment at special term, in favor of the plaintiff for \$267.08. The appeal was founded upon exceptions taken by the defendant's counsel upon the trial.

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The action was brought by the plaintiff, as endorsee, against the defendant, as first endorser of a promissory note. The defences set up in the answer were, want of notice of the dishonor of the note, and usury.

The cause was tried before Mr. Justice Paine and a jury, in April, 1853.

It is not necessary to state the proceedings on the trial, except so far as they relate to the two following exceptions, which are all that were taken to the ruling of the judge. One Gaige, who, without endorsing the note, had transferred it for value to the plaintiff, was examined as a witness on his behalf. The defendant, on the ground that Gaige was an assignor, offered himself as a witness on his own behalf to the same matter. He was objected to as incompetent; the judge rejected his testimony, and the counsel for the defendant excepted.

The answer, in setting forth the defence of usury, alleged, that "the contract between Gaige, the first holder, and Batt, the maker of the note, was usurious and void, by reason of the fact that the said Gaige took and exacted from the said Batt an illegal usurious interest for the loan or forbearance of the moneys to the said Batt, on the said note, when he received the note, in violation of the statute in such case made and provided; and that the said Gaige received from the said Batt, on the acceptance of said note for a loan on the same, a greater interest than at the rate of seven dollars for one hundred dollars." Upon the trial, the defendant offered to prove by Batt, that he had allowed an usurious rate of interest to Gaige when he gave the note. The counsel for the plaintiff objected to the evidence, upon the ground, that no usurious agreement was set forth in the answer. The judge was of that opinion and excluded the evidence, and the defendant's counsel excepted. The counsel then asked leave to amend the answer by making the charge of usury more definite, and the judge refused to allow the amendment. The jury found a verdict for the plaintiff for the amount of the note, with interest.

— *Porter* moved to reverse the judgment, and for a new trial, insisting that,—

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I. The judge erred in rejecting the defendant as a witness.
1. The witness Gaige was an "assignor of a thing in action or contract," within the meaning of section 399 of the Code. The note was a "thing in action or contract." (Kent. Com. 2 vol. 351; Chitty on Bills, 5, 245.) The witness Gaige was an "assignor." Webster's Dictionary words, "assign," "assignment," "assignor." (Code, sec. 112, and note to page 405, 2d ed.)

II. The defence of usury is set forth in the answer; if defectively set forth, the defendant should have been allowed to amend. (*Utica Ins. Co. v. Scott*, 6 Cowen 606.)

III. The defendant ought now to be allowed to amend.

T. Romeyn, for plaintiff, contended that—

I. There was no error in the court's overruling the application to receive the testimony of Bailey. Gaige, the witness for the plaintiff, was not the assignor of a thing in action within the meaning of § 399 of the Code. A negotiable note is not a chose in action, within the meaning of this section. At least, as between a blank endorsement and the holder (as was the case here) the latter takes as bearer. This has been repeatedly held in questions of jurisdiction in the U. S. courts. (2d Peter 326; 1 Mason 243.)

II. The evidence as to usury was properly rejected, the answer not having sufficiently set forth an usurious agreement. (10th Barb. 321; 12th Barb. 603.)

III. The application to amend was addressed to the discretion of the court, and its refusal is no ground of error.

By THE COURT. HOFFMAN, J.—Two questions only are raised.

I. Charles W. Pratt made his promissory note in favor of Samuel Bailey, the defendant. The latter endorsed it in blank, and transferred and delivered it to Preserved Gaige, and Gaige, in the language of the complaint, "transferred and delivered the same to the plaintiff, who is now the lawful bearer and owner of the same." It is sufficiently shown by the evidence that Gaige delivered this note without endorsing it. Gaige was

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examined as a witness on the trial on behalf of the plaintiff, and after his examination, the defendant offered himself as a witness to the same points as those to which Gaige had been examined. Upon an objection made, the witness was rejected, and this rejection presents the first exception taken.

The ground to sustain the admissibility of the defendant is, that Gaige was an assignor of a thing in action through which the plaintiff derived title, and that the adverse party may, in such case, offer himself as a witness to the same matter, under the 399th section of the Code.

Whether this section applies to the case of endorsers of negotiable paper at all, is a question we do not feel called upon to discuss. We are clearly of opinion, that the case of an endorser delivering a note without his own endorsement, is not within the provision.

It deserves notice that the holder of a note or bill may strike out all intervening endorsements; may omit to state them in his declaration after the first endorsement in blank; and may aver that such first endorser endorsed immediately to himself (Byles on Bills, 87); and if a bill be once endorsed in blank, although afterwards endorsed in full, it will still, as against the drawer, payee, and acceptor, be payable to bearer; though as against the special endorser, title must be made through his endorsee. (*Smith v. Clark*, Peake 225.)

The effect of this rule of law is, that a holder, however remote, may overlook the derivation of his title through a series of endorsers, and treat the payee of the note as the original source of his right. We cannot conceive that the Legislature meant, in the section before us, to adopt a rule which would conflict in principle with so settled a doctrine of mercantile law.

II. The next question arises upon the refusal of the judge to admit testimony to establish the defence of usury in the note, on the ground that the answer did not set forth sufficiently the facts constituting the usury, or usurious agreement.

The answer avers merely, "that the said Gaige took and exacted from the said Pratt an illegal usurious interest for the loan and forbearance of the moneys to the said Pratt on the said note, when he received the same in violation of the statute;

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and that he received a greater interest than at the rate of seven dollars for \$100."

It is needless to dwell upon this point. The answer is wholly insufficient to warrant the production of any testimony, and the application to amend it at the trial was also rightly denied. Both these positions rest upon authorities so numerous and consistent as to establish truisms in the law.

The appeal must be dismissed, and the judgment affirmed, with costs.

WILLIAM A. COURSEEN v. FREDERICK V. HAMLIN and others.

An order for the payment of money under subdivision 5, § 244 of the Code, will not be made, unless the answer contains a plain, explicit, and full admission that a definite sum is due to the plaintiff. It will not be made when, in order to ascertain whether a specific sum is due, a critical examination of the pleadings, or of books and accounts, is necessary.

The provision in the Code is regarded by the court as a recognition and declaration of the rule which formerly prevailed in the Court of Chancery, and as going no further.

The rule in that court was settled, that an order for the payment of money into court, or to a party before a final decree, could not be made unless upon an explicit and full admission by the defendant in his answer, or upon his examination before a master, that a specific sum was due.

A counter claim cannot be set up in an answer, which cannot be decided without bringing other parties before the court, who have no interest in the determination of the causes of action set forth in the complaint.

A partner is not allowed to claim for his services in settling the affairs of the firm, unless a special agreement is averred and proved.

Order at special term, so far as it directed a payment to plaintiff, reversed; in all other respects affirmed.

(Before OAKLEY, Ch. J., EMMET and HOFFMAN, JJ.)

November 22; December 10, 1853.

The complaint was filed by the plaintiff, as the special partner in a limited partnership, against the defendants as the general partners, who conducted the business of the firm under the name and style of Hamlin, Sloan & Squires, and the relief demanded was, that the defendants should be enjoined from

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interfering with or disposing of the goods, property, or credits, of the partnership; from collecting any moneys due thereto; that a receiver might be appointed to take charge of all the assets of the firm, and make distribution thereof; and that the defendants Hamlin and Sloan, under the direction of the court, should render a full account of the partnership, and of the goods, credits, and effects belonging thereto, and that in such accounting the plaintiff might be allowed interest on his share of the capital remaining unpaid from the time of its dissolution, and might be paid the amount due to him from the firm, with interest thereon, and might have such further or other relief as might be just.

The complaint charged that Hamlin and Sloan were each of them largely indebted to the firm for moneys drawn out by them beyond the shares to which they were respectively entitled, but admitted that nothing was due from Squires. Hamlin & Sloan answered together, Squires separately. Those parts of the pleadings upon which the questions decided arose, will be found fully stated in the opinion of the court.

The cause was now heard upon the pleadings and upon the following case and bill of exceptions.

The issues of fact joined in this action came on to be tried at a special term of this court, held by the Hon. Wm. W. Campbell, one of the justices thereof, without a jury, on the thirtieth day of June, in the year 1853.

The counsel for the plaintiff opened the cause upon the pleadings and claimed that there was an amount admitted by the answer of the defendants for distribution, and moved that the court order said amount to be paid by the defendants to the plaintiff, and a reference to take and state the accounts of each of the partners in the partnership mentioned in the complaint, and to ascertain, determine and settle their rights and interests respectively in the assets which remain uncollected and belong to the said late partners.

The counsel for the defendants, Hamlin and Squires, thereupon objected to the granting of said motion, and insisted that this action was founded upon the agreement for a copartnership entered into between the parties and the relation which they had sustained towards each other under that agreement

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during the time specified in it, and that the claim of the plaintiff therein was entire to recover the whole amount, which upon the taking of the accounts between the parties, should be found due to him from the defendants, or any or either of them, and that but one judgment could be given in the action for the payment of money by the defendants to the plaintiff. That it was not competent nor lawful for the court in this case, to render judgment for the plaintiff for the amount collected by the defendants and admitted in the answer (if any) and then to order a reference in the case to ascertain what other, or further sums might be due from the defendants to the plaintiff, and thereupon give a further judgment for the amount, (if any) which should be found to be due. That the whole cause should be tried by the court or referred.

His honor the judge overruled said several objections, and decided thereupon, that it was competent to the court to grant the motion for an order for the payment to the plaintiff, of the amount admitted by defendants' answer, and for a reference to take and state the partnership accounts, to which decision of the said judge, the counsel for the defendants Hamlin and Squires, then and there excepted.

The court then looked into the complaint and answer of the said defendants, and thereupon decided that the sum of six thousand dollars was admitted by the defendants, upon said pleadings, to be in their hands ready for distribution, and which should be adjudged to be paid by the defendants to the plaintiff, and directed an order accordingly for its payment. To which decision the counsel for the defendants, Hamlin and Squires, then and there excepted.

The counsel for the defendant, Frederick V. Hamlin, then further objected to a reference, to take and state the accounts of the partnership referred to, and set up in the complaint, on the ground that the answer of said defendant Hamlin, sets up a set off or counter claim growing out of previous copartnerships. The counsel for the plaintiff insisted that said claims were not, nor was either of them, a subject of set off, under statute of set off, nor of an equitable set off, nor a counter claim, for which a separate judgment could be rendered for the defendant, Frederick V. Hamlin, in this action, against the plaintiff, under the

provisions of the code of procedure. His honor the judge sustained the objections, and directed an order of reference to take and state the partnership accounts, and to his decision thereon, the counsel for the defendant, Frederick V. Hamlin, then and there excepted.

The counsel for the defendant, Frederick V. Hamlin, then moved the court to make it a part of the order of reference directed in this action, that the referee to be appointed should take proof of said claims set up in defendants' answer, which was objected to by the counsel for the plaintiff, and the objection was sustained by the judge, and to the decision thereupon, the counsel for the defendant, Frederick V. Hamlin, then and there excepted.

And, in as much as the said several matters so occurring upon the trial of this action do not appear by the record thereof, the said judge, upon the prayer of the defendants, Hamlin and Squires, hath affixed his seal to this bill of exceptions, the thirtieth day of June, in the year 1853.

J. T. Brady, for the defendants, insisted that the judgment at special term ought to be reversed, upon the following grounds.

I. The court erred in deciding that two separate judgments might be rendered in this action.

II. The court also erred, in ordering judgment for a certain sum, on the ground that it was admitted in the answer to be due. (a) Because no such imperfect or partial judgment could legally be rendered. (b) Because the admission was qualified and not absolute, and made in relation to certain counter-claims.

III. The court should have allowed the counter-claims to be considered in the reference, as this is a case in which a joint and not several judgments might, and, on the pleadings, must be rendered. The defendant, Sloan, is not liable for the so-called admitted balance.

IV. The court had no right to give judgment, founded exclusively on the supposed admissions in the answer. The whole answer must be taken together, and, if so taken, no judgment

upon it against either of the defendants could properly be rendered.

I. Dayton, for plaintiff, contra.

I. The court had the power to make the order for the payment to the plaintiff of the amount admitted by the answer of the defendant to be due him (Code, § 244; *Clarkson v. De Peyster*, 1 Hop. Ch. R. 274; *Roberts, administrator, v. Law*, 4 Sandford's Sup. Court Rep. 642; *Tracy v. Humphrey*, 3 Code Rep. 190).

II. Whether the sum of six thousand dollars is admitted by the answer of the defendants to be due the plaintiff, is not a question arising on these exceptions. Whether a certain amount is, or is not admitted by the pleadings to be due, is a question in respect to which, on objection, a judge cannot make a mistake. An objection was not made, nor does any appear on the exceptions, that the amount stated to be admitted is not admitted by the answer. The court will not look into the pleadings to examine the truth of matters taken for truth at special term (*Munson v. Hegeman*, 5 Howard's Prac. Rep. 223; 10 Barber's Sup. Ct. Rep. 112).

III. In point of fact, if the court will go into the inquiry, the sum of six thousand dollars and upwards is admitted, by the answer of the defendants, to be in their hands, and due to the plaintiff.

IV. The claim set up in the answer of the defendants, by way of counter-claim on the part and behalf of the defendant Frederick V. Hamlin, was properly disallowed by the court below (Code, § 150, Statute of Set-offs, 2 R. S. 354, 4 ed. 604; *Murray v. Toland*, 3 John's Ch. Rep. 573; *Dale v. Cook*, 4 John's Ch. Rep. 11; *Barber v. Spencer*, 11 Paige, 517).

V. The judgment of the special term ought to be affirmed.

BY THE COURT. HOFFMAN, J.—This was an appeal from an order made at the special term on the 30th of June, 1853, the case being heard on the pleadings alone.

The plaintiff sets forth that he was a special partner in the firm of Hamlin, Sloan & Squires, composed of the defendants

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and himself, under written articles of partnership, dated the 1st of January, 1849, and stated in the complaint. He sets out the grounds of his action in detail, and the relief sought is an injunction, receiver, an account of the partnership transactions, and payment of the amount which may be found due.

The averments in the answer need not be stated until the points raised in the cause are discussed.

The order at the special term was made upon the pleadings alone, and directed that the defendants pay and deliver to the plaintiff the sum of \$6000 which appears by the pleadings to be a just claim on the part of the said plaintiff from the said defendants, and applicable to the payment of the plaintiff's claim herein, and that the said sum be charged against the plaintiff on a final settlement of the accounts of the firm of Hamlin, Sloan & Squires. This is the first branch of the order which is appealed from, the other clause objected to will be afterwards noticed.

The appeal is taken on behalf of the defendants, Hamlin and Squires. These defendants alone appeared by counsel on the hearing below. The order probably was meant to extend to them only.

As to the defendant Squires, the complaint itself states that he had received only the share which he was entitled to under the articles of partnership, and that all the assets are in the hands of the defendant Hamlin. It is not perceived how the order can be sustained as against him.

But apart from this, and as to the defendant Hamlin, we consider the order to be incorrect. We regard the fifth subdivision of the 244th section of the Code which has been referred to, as recognising and declaring the rule which prevailed in the court of chancery, and as going no further. It was very clearly settled in that tribunal, that an application to pay money into court, or to a party before final decree, or, at least, before a report of a master, must be founded upon a full and explicit admission in the answer, or examination of the defendant, of a sum being due. The court will not examine the case to decide whether it is so. The order would not be granted if any examination of books or accounts was necessary to attain the result. It was refused in one case, though made upon the affidavit of an accountant

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that from an examination of schedules and books of the defendant a certain sum was due. (*Mills v. Hanson*, 8 Vesey, 68; *Roe v. Gudgeon*, Cooper's Cases 304. See also the important case of *Gilbert v. Colt*, before Chancellor Sandford, stated from MSS. 1st Hoffman's Ch. Pr. 323 n.)

Is there any such plain admission in the answer of this sum of \$6,000, being due by the defendants or either of them to the plaintiff?

The plaintiff alleges "that there is due to him on account of his share in the said partnership the sum of \$14,600 as nearly as he can estimate the same. That he has endeavored to ascertain the partnership property in the hands of Hamlin. That permission to the book-keeper to make out the settlement has been refused. But that from such information as he is able to obtain," he alleges "that there is now in the hands of said Frederick V. Hamlin, belonging to the said firm, subject to distribution and due to the said plaintiff in great part, the sum of \$6,000, and that said Hamlin refuses to make distribution of the property of the partnership."

In reply to this allegation the defendants referring to it explicitly aver, that "the debts have been paid; that there are no liabilities of the firm (with some specified exceptions); that the amount of the assets, exclusive of certain discounted notes, is about \$33,500, and including such notes, about \$40,000; and that the extent of the right or interest of the said Coursen therein is believed to be as hereinafter stated."

They then proceed to set out various counter demands, which they insist should be allowed against the plaintiff's share of these assets. There is clearly nothing like an admission of liability in a definite sum to be found here. The court must be compelled to ascertain by a minute examination of the case as presented, whether a sum may be considered as due. The authorities cited show that this duty is not imposed upon it.

But if it were imposed, the result in this case would not be certain; that is, it would not clearly appear that Hamlin owes the plaintiff on this account \$6,000 or about that sum; or ever had on hand moneys from the assets to pay him.

From an examination of the statements in the pleadings the following are probably the results.

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That the debt to the plaintiff is about the sum claimed of \$14,200. That the debt of the defendant Hamlin to the firm at the date of the answer was not over \$1,600. That the outstanding assets were about \$33,000. That these enter into the computation of profits, and of course make part of the debt due to plaintiff. It is on the assumption that the assets can be realized, that he becomes entitled to the debt which he claims. But upon clear principles in settling partnership accounts, the assets are first to be applied in payment of demands of creditors or partners made *quasi* creditors, and the personal responsibility of each for his balance due is only to be ultimately resorted to.

There is nothing on these pleadings to show that Hamlin had, at the date of his answer, any amount in hand from this sum of \$33,000.

It is by no means to be concluded that the statements thus made are accurate or approach to accuracy. It is only considered that these are the most probable results from the pleadings as they now stand.

The next objection of the defendant is, to that part of the order which directs that the alleged claims set up in the answer, by way of counter-claim on the part of the defendant Hamlin, be disallowed.

As to the counter-claim which is stated to have arisen by reason of a demand against the plaintiff, arising out of the concerns of the firm of Fitch, Sloan & Hamlin, we are of opinion that the matter cannot be entered upon in this suit; that the members of that firm should be parties to any proceedings to adjust it.

The other alleged counter-claims are for a compensation for services rendered in settling the concerns of the firm of Fitch, Hamlin & Sloan, and Hamlin, Sloan & Teft. Besides other objections, it is sufficient to say that there is no statement of an express agreement to pay for such services; and that a partner cannot, without such agreement, be allowed a compensation.

The order is in these particulars correct. The order of the special term must be vacated as to the direction to pay over the \$6,000, and be, in all other respects, affirmed.

Chegaray v. The Mayor of New York.

CHEGARAY v. MAYOR AND CORPORATION OF NEW YORK.

Under the Revised Statute relative to the assessment and collection of taxes, every building erected for the use of a seminary of learning, whether the seminary be incorporated or not, and whether public or private, is exempt from taxation.

The building in question was originally planned as three distinct houses; but soon after the foundations were laid, it was agreed between the owner and the plaintiff, that it should be altered and finished so as to adapt it exclusively as one building, to the use of a boarding-school for young ladies; and it was altered and finished accordingly.

Held, that by a reasonable construction of the statute, it was to be considered strictly as a building erected for the use of a seminary of learning.

Held, that it did not lose its character as such by the fact that the scholars were boarded and lodged, and part of the building used for the dwelling of teachers.

Held, that the defendants having admitted, by their answer, that they had received taxes unlawfully collected from the plaintiff, were precluded setting up as a defence, that the plaintiff ought to have sought her remedy by a *certiorari* or *mandamus*, or in an action against other persons.

(Before OAKLEY, Ch. J., EMMETT and HOFFMAN, J.J.)

November 21; December 17, 1853.

THIS, substantially, is the same case as *Chegaray v. Jenkins* (reported, 3 Sand. S. C. Rep. 409). It involves the same questions, and seeks to recover the same amount. The judgment of this court in *Chegaray v. Jenkins*, was reversed by the Court of Appeals, on the ground that, whether the taxes upon the building occupied by the plaintiff were lawfully assessed or not, the defendant Jenkins, who, as a constable, had collected them, was protected by the warrant from the receiver of taxes, under which he had acted (1 Selden, p. 376). In consequence of this reversal, this action was brought against the corporation of the city, claiming to recover, as unlawfully assessed, the amount of the taxes which Jenkins had collected, and which the complaint alleged that he had paid over to the defendants.

The defence set up in the answer was, that the building which the plaintiff claimed to be exempt from taxation, as a seminary of learning, consisted in effect of three dwelling-

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houses, which were principally used, and were liable to be taxed, as such. The answer did not deny that the defendants had received the several sums collected by Jenkins, as alleged in the complaint.

The cause was tried before Mr. Justice Paine and a jury, on the 20th December, 1852, and, upon the trial, the counsel for the plaintiff read in evidence the following stipulation.

"It is hereby stipulated, that on the trial of this cause, the following facts are to be admitted, as duly proven, viz.:

"That the building occupied by the plaintiff, as charged in the complaint, that is to say, Nos. 14, 16 and 18, Union place, was originally intended for a school, to be occupied as such by the plaintiff, and was continued and completed accordingly. That the building was originally planned for three houses, but was altered and finished as one, for the purpose of being used as a school. That, in carrying up the walls, doors were either cut, or left open, in the brick partition walls of the buildings, for the purpose of connecting the three, and the building was finished as one house. The corner house, or what was intended to be such, was finished without door for entrance hall, or staircase, the whole of the lower floor being left flush, and finished as one large exhibition or music-room, openings being left in the brick partitions, so that the staircase of the next building could be used for access to the second story. In the basement, and also on the third floor, the building was finished without partitions, so as to be used as refectory and dormitory. The whole building was originally planned as three distinct houses, but shortly after the foundation was laid, an arrangement was made between Mr. Ruggles (the owner) and Madame Chegaray, that the building should be altered and finished for the purpose, and exclusively to the uses, of a school, and could not be used for the purpose of a public or private dwelling-house or houses without entire alterations, and at an exceedingly heavy expense.

"It is further stipulated, to admit as a fact, subject to objection as to the competency of such testimony, that Columbia College and the New York University Buildings have been, and are used for the purpose of dwelling-houses for professors, and

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boarding for students, and that portions of those buildings have been at times let out for purposes unconnected with education.

"It is further stipulated to admit, for the purpose of this trial; that Heloise D. Chegaray, the plaintiff in this suit, was, at the time of assessment and levy hereinafter mentioned, and has been for some years previous thereto, the lessee and occupant of certain premises on Union Place, in the eighteenth ward of the city of New York, known as Nos. 14, 16 and 18 Union place.

"That the assessors legally elected and holding office in said ward, did assess house and lot No. 14, in the sum of fifty-five dollars twenty-two cents; house and lot No. 16, in the sum of one hundred and twenty-five dollars fifty-two cents; house and lot No. 18, in the sum of one hundred and forty dollars fifty-seven cents; said houses and lots being the said premises leased and occupied by the said Heloise D. Chegaray.

"The said assessment was confirmed, according to law, by the Board of Supervisors of the city and county of New York, on the 12th day of October, A.D. 1846, and a warrant issued by them, in due form of law, to the receiver of taxes in said city, to collect from Madame Chegaray, who is the plaintiff in this action, the sums mentioned opposite to her name, according to the provisions of the statute in such case made and provided, such sums being the sums above mentioned, as assessed upon the premises leased and occupied by her.

"That such assessment of taxes was not paid previous to the twentieth day of January, A.D. 1848, and has not since been paid.

"That a warrant was issued by the receiver of taxes of the city of New York, in due form of law, to the defendant, Joseph Jenkins, a constable of said city, commanding him to levy the amount of tax set opposite the name of the said plaintiff, by distress and sale of the goods and chattels of the plaintiff, and that the said amounts are the amounts above mentioned as assessed.

"That under and by virtue of such warrant, the defendant levied upon the property belonging to the said plaintiff, for the taking and converting of which this action is brought.

"That all notices required by law to be given or published in the premises, were duly given or published.

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"And it is further stipulated, that it shall be admitted on trial, that the premises above mentioned, at the time of such assessment and levy, above mentioned, were occupied by Madame Chegaray, as a boarding and day school for young ladies; and one of the rooms of said premises was used as a dormitory and office.

"It is further stipulated, that either party may read from the printed case, in the suit of *Chegaray v. Jenkins*, in this court, the facts contained therein. And, if required, the plaintiff will produce on the trial, the maps referred to in said case.

"HENRY E. DAVIES,

"Att'y for Defa.

"TUCKER & CRAPO,

"For Plaintiff."

The plaintiff then rested.

The defendants' counsel then read, subject to objection as to its competency, a printed circular, showing the terms and character of the plaintiff's school, as a boarding and day school for young ladies.

And it was admitted by the counsel for the plaintiff, that the premises in question are, and were, at the time the same were assessed for the tax sought to be collected by the defendant, occupied in accordance with the terms expressed in the circular, and for the purposes therein mentioned.

It was further admitted by the counsel for plaintiff and defendant, that the property specified in the plaintiff's complaint, was levied on by a constable of the city of New York, and the money collected therefrom in manner and form as in said complaint is stated.

The jury thereupon, under the charge of the judge, found a verdict for the plaintiff for \$2,400, subject to adjustment as to amount, and subject to the opinion of the court, upon a case to be made; either party to have liberty to turn the same into a bill of exceptions.

T. U. Tucker moved for judgment for the plaintiff upon the verdict, and argued as follows:

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I. The premises occupied by the plaintiff, at the time of the assessment, and of the levy, was a "building erected for the use of a seminary of learning," and, as such, was exempt from taxation (1 Rev. Stat., sec. 4, title 1, chap. 12, part 1, p. 388 ; Opinion of Court of Appeals, in *Chegaray v. Jenkins*, 1 Selden, 876 ; 3 Sand. 409).

II. The distress warrant and levy referred to in the complaint, were, as to the plaintiff, illegal. Her right to the property levied on, was not divested thereby. 1. The premises in question being exempt by law from taxation, neither the assessors nor supervisors had any jurisdiction in relation thereto, their powers and duties being specifically confined to taxable property (*Suydam & Wyckoff v. Keys*, 13 Peters, 444 ; 1 Rev. Stat., part 1, chap. 12, title 2, art. 2.). 2. The Revised Statutes, in relation to the collection and assessment of taxes, contain no provisions which can apply to property exempt from taxation. They direct the assessors to ascertain the property which is taxable, and make a roll of such only. They authorize the assessors to reduce the amount of a tax, or correct a mistake in one, but do not authorize the remission of a tax, nor provide any means of compelling them to remit a tax. 3. The premises of the plaintiff being absolutely exempt by law, her legal rights could not be affected by any proceedings of the assessors or supervisors, in relation to a subject as to which the statutes gave them no authority (1 Rev. Stat., part 1, chap. 12, title 2, art. 2, sec. 8, 15, 17, 22, 23 ; *Elliott v. Piersoll*, 1 Peters, 328).

III. The officer who made the levy on the plaintiff's property, in so doing, acted as the agent or servant of the defendants, duly authorized. They are liable for his acts, and the consequences thereof (*Clark v. Corporation of Washington*, 12 Wheat. 40 ; *Chestnut Hill Turnpike Co. v. Rutter*, 4 Leig. & R. 6). Whenever a corporation can order an act to be done, they are liable for the consequences (3 Starkie, 50 ; *The Mayor, &c. v. Bailey*, 3 Hill, 531, 538). All corporations act through agents, and when the act of the agent is illegal, the corporation is directly responsible (*Gortloe v. City of Cincinnati*, 4 Ham. 500).

IV. The defendants actually received and retained the

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plaintiff's property, levied on by a city constable, for a tax from which her premises were exempt. The plaintiff has a right to recover the property and money so received by the defendants, and as money had and received by them for the plaintiff's use. Assumpsit will lie against a corporation for damages, assessed by a jury, for land of the plaintiff taken by the corporation (*Stafford v. Corporation of Albany*, 4 John. Rep. 1; Angell & Ames on Corporations, sec. 379, 380, 385; *Smith*, assignee, v. *Birmingham Gas Co.*, 1 A. & E. 520; *Yarborough v. Bank of England*, 16 East. 6).

V. The Revised Statutes having provided no mode in which the assessors or supervisors might be compelled to erase the plaintiff's building from the assessment roll, she would be wholly unprotected against a distress for an illegal tax, unless her right of action against the defendants can be maintained.

R. J. Dillon for the defendant, insisted that the verdict should be set aside and a verdict and judgment thereon be ordered for the defendants.

I. The premises occupied by the plaintiff were not exempt from taxation. 1. It is not a *public* establishment. Every building mentioned in the third class of exemptions, is a public building, except a "seminary of learning" and "school house;" and upon the principle in the construction of statutes, *nosciuntur a sociis*, they must be public, otherwise they are not exempt. (*Chegaray v. Jenkins*, 3 Sandf. 409.) 2. No "seminary of learning" is exempt, unless the building was *erected* for such. The buildings in question were erected for private investment, and were built in the usual manner of dwelling-houses, and to be used as such, with alterations, after the seven years' lease of the plaintiff should expire. 3. If the exemption embraces a private "seminary of learning," then it follows, that if it were originally erected for such, it would be for ever thereafter exempted from taxation, although it might at any time afterwards cease to be used as such. Such being the necessary consequence of such a construction, shows that such could not have been the intention of the legislature. 4. It is not a "school house," in the usual and ordinary signification of the word. 5. The

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opinion of Ruggles, C. J., in *Chegaray v. Jenkins*, 1 Selden, 876, is not the opinion of the court, and must be considered *obiter dicta*.

II. The assessors, tax commissioners, and board of supervisors, had jurisdiction of the property, and acted judicially in determining that it was not exempt. Their decision is conclusive until it is reversed. It cannot be reviewed collaterally. (*Van Rensselaer v. Whitbeck*, 7 Barbour, 138; *Osborne v. Danvers*, 6 Pick. 98; *Chegaray v. Jenkins*, 1 Selden, 818.)

III. The remedy of the plaintiff is by an application to the assessors and to the supervisors, or by certiorari, or by mandamus, or by trespass against the five supervisors who issued the warrant to Jenkins. (*Chegaray v. Jenkins*, 1 Selden, 382. 1 R. S. 393, sec. 22; Act of 1850, ch. 121, secs. 18, 28.)

IV. The case shows no cause of action against the defendants. 1. The case shows no act done or authorized by the defendants in the collection of the tax. 2. The allegations that the defendants issued the warrant to Jenkins, and that Jenkins paid the money to the defendants, are conclusions of law not pretended to be an averment of the fact, and admitted by the plaintiff to be incorrect, unless the court should deem the facts stated to warrant the averments as conclusions of law. 3. There is no relation of master and servant, or of principal and agent, existing between the *corporation* and the persons authorized to assess and collect the taxes. Unless such relation exists, the corporation is not liable in cases like the present. They do not grant the authority to assess the taxes; such authority is granted by the annual tax law of the state. Nor do they assess the taxes; taxes are assessed by assessors, elected by the people, and confirmed by the board of supervisors, over whom the defendants have no control. Nor are the taxes assessed for their benefit alone; they are assessed for county and state purposes. The amount of the former is not easily ascertained; that of the latter exceeds \$200,000 a year, embracing the mill and school tax. The corporation does not receive the taxes after they are collected; they are paid to the chamberlain, as the treasurer of the county, who pays over to the comptroller of the state so much as are state taxes, and disburses the residue, partly upon the warrants of the supervisors for

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county purposes, and partly upon the warrants of the corporation for city purposes. The defendants have no control of the funds for their own purposes, as a corporation, but only for such purposes as shall be expressly authorized by the annual act. They can neither direct what property shall be assessed nor what shall be relieved; such power belongs to the supervisors. Nor can they direct what shall be paid into the hands of the chamberlain, and what he shall reject. The defendants do nothing in the collection of the taxes, as the agents of the state, for the purposes of local government and in aid of the finances of the state. (Act of 1813, vol. 2, p. 399, sec. 150, 151, 152, 155; Act of April 6, 1816, p. 123, sec. 1, 2; 1 R. S. 714, 4th edit. chap. 13; Act of 1850, ch. 121; Angell & Ames, sec. 30 to 36; *Martin v. Mayor*, 1 Hill, 545; *Wilson v. Mayor*, 1 Denio, 595; *Bailey v. Mayor*, 4 Hill, 531; 2 Denio, 434.)

Judgment should be rendered for the defendants, with costs.

By THE COURT. EMMET, J.—This action was brought to recover from the defendants an amount levied upon the property of the plaintiff under a warrant issued by the receiver of taxes, upon the ground that the premises were exempt from taxation, and that the defendants had received the amount collected.

When the subject matter of the present suit was before this court in the case of the present plaintiff against Jenkins, the decision against her was rested upon these grounds; first, that the exemption clause of the statute related to an incorporated seminary of learning, as well as to an incorporated academy; and next, that the act of 1823, as amended by the act of 1825, was decisive against the plaintiff and that such act of 1825 was not repealed. (3 Sand. Sup. C. Rep. 409.)

The court of appeals have shown that, in the latter position, this court was mistaken, and that the act of 1825 was repealed.

Conceding the force of the reasoning of the learned judge in this court upon the construction of the act as it now stands, we cannot escape from the conclusion that the court of appeals have overruled it, and settled a different interpretation. It is true that such court decided the cause against the plaintiff upon a ground entirely distinct from this question, and that it was

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unnecessary to have said a word upon the point. But that point was raised; was argued by the counsel; was elaborately discussed by the court, and seems to have been positively decided. We think we are warranted in saying that it was decided by the whole court, with the exception of one judge. The construction has then the sanction of the court, whether the whole of the reasoning of the presiding judge received their approval, or not.

II. The statute provides that every building erected for the use of a college, incorporated academy, or other seminary of learning, shall be exempt from taxation. The first and most natural meaning of this phrase is, that the building was from the beginning designed for a seminary, and that this design continued throughout the period of its construction. In the present case it appears from the stipulation (all the clauses being considered together) that the building was probably first intended for private dwellings. But when the foundation only was laid, the agreement took place between the owner and the plaintiff; and every portion of the building subsequently erected was constructed for the use, and adapted to the purposes of a seminary.

It is a reasonable construction of the clauses of the statute in question to hold, that this building, under these circumstances, is within it, that it was erected for the use of a seminary of learning. It would be perhaps an unreasonable construction to hold that an existing building used for other purposes, and then altered, could be exempt. We shall not attempt to define where the line of discrimination is to be found.

III. The liability of the defendants to pay the money, if the legal defences stated in their answer are invalid, is fixed by their own admissions. The allegation of the complaint is positive that several sums as collected by the constable were paid and delivered to the defendants. They omit to deny this allegation in every form. We cannot be bound to trace the destination of the money beyond this, nor to discuss the complicated relations which the chamberlain of the city bears to the city, the county, and the state. That officer is the officer of the city to some extent, at least, in regard to the moneys raised by taxes. If the portions of what he received can be severed and traced,

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the defendants have released the plaintiff from doing so and have assumed that task themselves.

Judgment must be entered upon the verdict for the plaintiff. The counsel of the parties, we understand, have agreed to adjust the amount.

NEUSTADT and another v. FLORA JOEL, impleaded with others.

A general creditor cannot maintain an action to set aside an assignment as fraudulent and void as against creditors. The rule that such an action can only be brought by a judgment creditor, has not been altered by the Code.
(Before DUNE, CAMPBELL, and BOEWORTH, J.J.)
December 10, 1868.

APPEAL from a judgment at special term sustaining demurrer to the complaint.

The complaint stated that Alfred and Louis Joel were copartners and dealers in jewelry, under the name of A. Joel & Co.; that at various times previous to the 1st January, 1853, the plaintiffs (doing business under the name of Neustadt & Barnett) sold the said A. Joel & Co. merchandise to the amount of \$2,491 ⁷⁷/₁₀₀, and that the credit had expired on the sales, and the amount was due and unpaid; that the said A. Joel & Co. had recently come to the United States, and established themselves in business on an extensive scale, and had contracted large debts by making purchases of the plaintiffs and others; that they, said A. Joel & Co., had recently made an assignment of their stock in trade as copartners (and whether other property, the plaintiffs had no knowledge or information to form a belief) to the defendant Flora Joel; that Flora Joel was the sister of the said Alfred and Louis, and a young woman without any means, and obtained a livelihood by the manual labor of embroidering shoes, &c.; that the assignment had been made ostensibly to secure a pretended indebtedness of Alfred and Louis of \$5,000 or \$6,000 to one Mrs. Levy, resident in Eng-

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land; that the debt was fictitious, and set up by the assignors in collusion with the assignee, and that the assignment was colorable only, and made to defraud creditors, and that the assignee was a party to the fraud; that the said Alfred, Louis, and Flora, had commenced to sell at auction the property pretended to be assigned; that the auctioneer, H. H. Leeds, had received and held a portion of the proceeds of such property as had been sold; that great and irreparable injury would be done to the plaintiffs if the Joels should dispose of said property, and the pretended assignment should be allowed to stand and be carried into execution, or the auctioneer be allowed to pay over the funds received by him, and unless an injunction issue. The complaint then prayed for judgment for the debt, with interest, against A. & L. Joel, and costs of the suit, an injunction against all the defendants, and that the assignment should be declared fraudulent, null and void, and that a receiver be appointed.

● The defendant, Flora Joel, demurred to this complaint; and showed, among other causes, that the plaintiffs were creditors at large, and had no lien by judgment, or execution, or otherwise, on the property assigned; that they had not exhausted their remedies at law in execution, and did not show that they had any judgment and execution issued and returned unsatisfied, and were in no position to impeach or disturb any disposition that A. Joel & Co. might have made of their property.

John Graham, for plaintiffs,

J. B. Herbert Judah, for defendant, Flora Joel,

BY THE COURT. DUEB, J.—The plaintiff is a general creditor, who seeks to set aside an assignment made to the defendant, Flora Joel, as fraudulent and void, as against creditors, and, it is plain, that, as against her, he is not entitled to the relief, or any part of the relief, which he demands, unless his right as a creditor to impeach the assignment is apparent upon the face of the complaint. It is needless to cite authorities to prove that before the Code no such action could be maintained by a creditor, without averring that he had obtained a judgment

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against the debtor making the assignment, and that upon this judgment an execution had been issued, and returned unsatisfied; nor do we understand it to be denied that such was the settled law. The whole argument, upon the part of the plaintiff, rests upon the assertion, that the law in this respect has been altered by the Code, and that by force of the alteration every creditor has now the same right to have a fraudulent assignment set aside for his benefit, as was formerly possessed by judgment creditors alone.

This very important alteration of the law, as hitherto administered, is alleged to have been effected by § 219 of the Code; but upon examining the provisions of that section, it seems to us manifest, that they have no bearing whatever upon the question of the right of a general creditor to maintain an action like the present.

The sole object of the section is to enumerate and define the cases in which a temporary injunction may be granted, but all of these are cases in which it appears by the complaint, that the plaintiff is entitled to the relief demanded, against the defendant, to restrain whose acts or proceedings the injunction is sought. The section, doubtless, enlarges the powers of the court to grant injunctions, but does not enlarge the rights of the plaintiff, in any case, to maintain his action, but leaves the question, whether he is or is not entitled to the relief demanded by his complaint, to be determined by the existing law; the law as previously understood and established. Governed by this law, the judge at special term has decided the issue raised by this demurrer in favor of the defendant, and governed by the same law, we cannot do otherwise than affirm his decision.

It would, perhaps, be a salutary change in the law to allow a remedy to creditors in cases like the present, even before their debts have passed into judgment; but such a change, however desirable, can only be made by the exercise of legislative power, and is wholly beyond that of the judiciary.

The judgment appealed from is affirmed, with costs.

GEORGE A. SCHUFELDT, Receiver, v. CHARLES ABERNETHY.

An assignment for the benefit of creditors gave an authority to the assignee to sell the property assigned, "upon such terms and conditions as in his judgment may appear best, and most for the interest of the parties concerned."

Held, that these words, by a necessary implication, gave a discretionary power to the assignee to sell upon credit, and, therefore, according to the judgment of the Court of Appeals in *Nicholson v. Leavitt*, rendered the assignment, upon its face, fraudulent and void.

(Before DUEB, CAMPBELL, and BOSWORTH, J.J.)

December 16, 1853.

THIS was a complaint filed by the plaintiff as receiver of Cornelius Lockwood, a judgment debtor, to set aside an assignment made by the debtor to the defendant.

The assignment preferred creditors, and the only grounds upon which it was sought to be set aside were, that it contained a provision authorizing the assignee to sell the assigned property on such terms and conditions as in his judgment might be deemed best," and that no schedule of the property was annexed to the instrument as required by its terms.

The cause was argued, at special term, before Mr. Justice CAMPBELL, and the assignment held to be void as to creditors. From his judgment the defendant appealed.

C. F. Sandford, for appellant, made and argued the following points.

I. The assignment in question was made and accepted with the *bond fide* intention of distributing the property of the assignor among his creditors, and not for the purpose of hindering, delaying, or defrauding them. 1st. The answer denies any fraudulent intent, and none appears from the proofs. 2nd. There was an actual *bond fide* indebtedness from the assignor to the preferred creditors, prior to the assignment. 3rd. The assigned property was subject to the lien of an execution previous to the assignment, and an advance was made by the pre-

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ferred creditors, in addition to their previous claim, of a sum sufficient to remove said lien. 4th. The transfer is absolute and unqualified, without reservation of benefit or control to the assignor. 5th. There was an actual and immediate delivery of the assigned property and books of account, constituting the assignor's whole effects. 6th. There is no resulting trust in favor of the assignor until all his debts are paid.

II. The omission to annex schedules to an assignment for the benefit of creditors is not *per se* fraudulent; and, if it raise a presumption of fraud, the same may be repelled by the facts and circumstances attending the execution of the instrument. (*Cunningham v. Freeborn*, 11 Wend. 241, 254; *Keyes v. Brush*, 2 Paige, 311; *Stevens v. Bell*, 6 Mass. 339; *Havens v. Richardson*, 4 New Hamp. 124; *Pierpont v. Graham*, 4 Wash. C. C. R. 232.) The facts proved, already adverted to, tend to repel a presumption of fraud. 2nd. The preparation of a complete inventory, and the delivery thereof to the assignee simultaneously with the execution and delivery of the assignment itself, are, in effect, equivalent to annexing a schedule, and fully obviate any objection arising from its omission.

The omission of a schedule, to which reference is made as "annexed," leaves no such uncertainty in the words of description, as would invalidate the instrument, considering it as a conveyance. 1st. The annexation thereof is not rendered by such reference a condition precedent to the complete execution of the transfer. (*Woodward v. Marshall*, 22 Pick. 468; *Keyes v. Brush*, 2 Paige, 311; *West v. Steward*, 14 Mees. and Wel. 47.) 2nd. The general words of description used cover the whole property of the assignor, and although the subsequent specification of particular articles would have controlled and limited the meaning, had a schedule been actually annexed, specifying particular articles only, and not purporting to be a complete inventory of the assignor's effects, still the entire omission of any schedule will not be regarded as defeating the operation of the general words, the obvious intent of the instrument being to convey the whole of the assignor's property, and the omission of the schedule being, obviously, a mere misprision, cured by the proofs. (*Olap v. Smith*, 16 Pick. 247.)

IV. The trusts created by the assignment are such as have

long been sanctioned and sustained by the courts, and their legality was unquestioned, until the recent decision of the Court of Appeals in *Nicholson v. Leavitt*, reversing the judgment of this court, and approving the prior case of *Barney v. Griffin* (2 Com. 365), threw a doubt upon the construction of that clause in the instrument, which vests in the assignee discretionary power over the terms of sale. 1st. The general principle that preferences among creditors may be secured by a voluntary assignment for their benefit is deemed too well established to be controverted. (*Murray v. Riggs*, 15 John. 571; *Grover v. Washburn*, 11 Wend. 194.) 2nd. The trust to sell upon such terms and conditions, as, in the judgment of the assignee, should appear most for the benefit of the parties concerned, was lawful, and its execution would involve no hindrance or delay as against creditors. (a.) The law requires a trustee to exercise his best judgment in the management of his trust, and the courts, upon application of any interested party, will restrain any erroneous exercise of judgment. The trustee, exercising his judgment, is still amenable to the law, and liable for any violation thereof. (*Rogers v. De Forest*, 7 Paige, 272.) (b.) The trust under consideration vests no such authority in the assignee to sell on credit, as is contemplated by the decisions of the Court of Appeals, above referred to. (c.) There is a marked distinction between those cases and the present one. In the former, the authority to sell on credit is express and absolute. In the latter, if it exist at all, it must be implied. (d.) Courts will not imply a violation of law. On the contrary, if it be established that an authority to sell on credit is unlawful and fraudulent, it will be presumed that no authority to make such sale was contemplated in, or conferred by, the instrument in question. (e.) But the very terms of the instrument preclude the implication of such an authority. The assignee is expressly directed to "convert" the assignor's effects into "money," not into notes or debts. (f.) It is believed that the courts, and the profession generally, do not regard the decisions above referred to as establishing the doctrine claimed by the plaintiff in this case. A contrary position has been repeatedly taken by the judges of the Supreme Court at special term. (*Southworth v. Sheldon*, 7 How. Pr. 414; *Whitney v. Krows*, 11 Barb. 198.)

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V. The advance made to the plaintiff in the execution, by the preferred creditors, for the purpose of relieving the property from the execution lien, was made in good faith, and upon the condition that the assignment should be executed. If the assignment be set aside, the preferred creditors have an equitable claim to the extent of such advance. The ruling of the court, at special term, in authorizing the assignee to retain the amount so advanced out of the assigned property, was in accordance with law and equity.

VI. The judgment of the court at special term, in pronouncing the assignment fraudulent and void as against creditors, was erroneous, and should be reversed. The assignment should be decreed valid, and judgment be entered for the defendant, with costs of the appeal.

J. C. Dimmick, for respondent, *contra*.

I. Assignments creating preferences are not encouraged, but simply tolerated by law; the parties claiming under them must be prepared to show with certainty their validity; the law will not aid them by any presumptions in their favor. (*Webb v. Dagget*, 2 Barb. 9; *Woodburn v. Mosher*, 9 Barb. 257.)

II. The assignment in question vests in the assignee a discretion to sell upon such terms and conditions as in his (the assignee's) judgment may appear most for the interest of the parties concerned, thereby depriving the creditors of their prior and better right to dictate the terms upon which the property should be sold, and empowering the assignee to sell upon credit if he sees fit, and thereby do of his own volition what he has no right to do, except by consent of the creditors, or by order of the court. (*Barney v. Griffin*, 2 Com. 365; *Nicholson v. Leavitt*, 4 Sandf. 252. Overruled in Court of Appeals. See Judge Edmonds' opinion.)

III. The assignment itself is imperfect, and never was so executed as to vest the property in question in the assignee; there is a failure in describing the property assigned, arising from the want of the schedule mentioned in the assignment, thus showing that the instrument in question was never executed or intended as a full and perfect assignment, and all pro-

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perty therefore belonging to the judgment debtor, of which defendant has possessed himself by virtue of this incomplete instrument, must be regarded as held by him for the benefit of the plaintiff, representing the creditors of the judgment debtor. (*Anvill v. Loucks*, 6 Barb. 470; *Porter v. Williams*, 5 H. Practice Rep. 441; *Wilkes & Fontain v. Ferris, Sh'ff, &c.*, 5 John. Rep. 335; *Moir & Norton v. Brown*, 14 Barb. 39.)

IV. If the assignment should be regarded as executed, it is clearly fraudulent; it is in effect an assignment of so much of the assignor's property as he should thereafter elect to put on the schedule. (5 John. Rep. 335.)

By THE COURT. DUER, J.—Were we at liberty to follow our own convictions, we should probably have no difficulty in holding that this assignment is valid, and consequently would feel it our duty to declare that the judgment at special term, as erroneous, must be reversed.

But we are not at liberty to follow our own views. The Court of Appeals, in reversing the judgment of this court, in *Nicholson v. Leavitt*, has established the doctrine, that an assignment made by an insolvent debtor for the benefit of his creditors, is, upon its face, fraudulent and void, when, by its terms, a discretionary power is given to the assignee, by the exercise of which, the immediate conversion of the property into money, or the immediate distribution of the proceeds of its sale among the creditors, may be prevented or delayed. Such a provision, it seems, is conclusive evidence of an intent to delay the creditors, and an intent to delay creditors, it also seems, is equivalent to an intent to defraud them.

It may be that the discretion is given with a sole view to benefit the creditors by enlarging the fund out of which their debts are to be satisfied, but this circumstance, whether manifest or proved, is deemed immaterial. The assignment, to be valid, must either by express words, or by its necessary legal construction, devote all the property which it embraces, not only absolutely and unconditionally, but immediately to the payment of the creditors. It must be made the duty of the assignee to sell the whole, with the least possible delay, and for cash; and where a discretion is given, the exercise of which, in

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a particular mode, would be inconsistent with the discharge of this duty, not only the objectionable clause, but the whole instrument is void. Such is the doctrine, which was first announced by Bronson, J., in *Barney v. Griffin* (2 Comst. 365), which the Court of Appeals, in *Nicholson v. Leavitt*, has adopted and affirmed, and which we, therefore, are now bound to say, is established as law. In obedience to the law thus established, we are constrained to declare, that this assignment, although we entertain not the slightest doubt as to the actual good faith of the parties, is, upon its face, fraudulent and void.

The discretionary power given to the trustee in the assignment, which, on the sole ground that it contained the power, was set aside as fraudulent in *Nicholson v. Leavitt*, was that of selling the property assigned for "cash or upon credit." The authority of the trustee in the case now before us, is to sell the property "upon such terms and conditions, as in his judgment may appear best and most for the interest of the parties concerned." The words are not the same, but, we apprehend, that in the meaning there is not the slightest difference. "Terms and conditions," can only mean terms and conditions of payment, and unless in connexion with the words that follow in the clause which we have quoted, they convey by a necessary implication, a discretionary power to sell upon credit—they are absolutely without significance or purpose—they are not merely superfluous, but senseless.

The objection is not met by saying that as a sale upon credit is an illegal act, the court will not presume that the discretion given will thus be exercised. The question is not whether the discretion will be exercised, but whether it was meant to be given, and is given, by the words that are used; for as we understand the decision of the Court of Appeals, it is the intent of the debtor to delay his creditors, as manifested by his grant of the discretionary power, not the probability, or improbability of the future exercise of the power, that vitiates and nullifies the assignment.

It may be true that when there are several modes of exercising a discretion, one of which is prohibited by law, the others not, the court, in order to sustain the grant, will presume

that a lawful authority only was meant to be given. But the difficulty in this case is, that if you take away the power to sell upon credit, no discretion remains, since there can be no exercise of a discretion as to the terms and conditions of a sale, when it is for cash, and cash alone, that the sale can be made. There is no discretion where the duty is single and imperative.

We repeat then, that the question relates only to the intent of the debtor in granting a discretionary power, as evidenced by the terms of the grant, and that, in this case, the debtor meant that the assignee should sell the property upon credit, if in his judgment that course would be most beneficial to the parties interested, and that this intent is manifest, from the terms he has used, we think it is impossible to doubt. We can perceive no reason for giving to the words of this assignment a different construction from that which would be certainly given to the same words in an ordinary power of attorney. Where the power given to the attorney is to sell real or personal property, upon such terms and conditions as he may deem most for the interest of his principal, the validity of a sale made by him in good faith, upon credit, we apprehend has never been doubted. The sale, however, cannot be valid, unless the words embrace and convey the authority.

Nor, in our judgment, is this construction of the words used in this assignment varied or affected by the direction that follows in the clause that we have quoted, "to convert the property into money." The duty of converting the property into money is expressed or implied in every assignment, since where the creditors are to be paid in money, such a conversion must of necessity precede the payment. It is to this ultimate and necessary conversion that the direction in question must be construed to refer, since if construed as imposing the duty of making the conversion by an immediate sale of the whole property, the discretion previously given to the assignee of selling upon such "terms and conditions as in his judgment might appear best," is taken away entirely, and the words of the entire clause are seen at once to be repugnant and contradictory. As it is certain, however, that there was no such contradiction in the mind of the assignor, we are compelled in this, as in all similar cases, to adopt a construction which, as removing the

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apparent repugnancy, will most probably be consistent with the real intention.

If there can be a distinction made between the cases, in which the power to sell upon credit is given by express words, and those in which the words, although general, can only be satisfied by holding that they embrace the power, we must leave it to be made in the Court of Appeals, since we are ourselves unable to see that there is any ground in reason upon which the distinction can be rested.

Holding, therefore, as we do, that this case is in principle the same as *Nicholson v. Leavitt*, and yielding our personal convictions, as we must, to the controlling authority of that decision, no other course is left to us than to affirm the judgment at special term.

Judgment affirmed, with costs.

RENARD & others v. HARGOUS.

A justice of the Superior Court, on the 28th December, 1848, issued an attachment against the property of H. & Co., merchants at Vera Cruz, as non-resident debtors. The application for the attachment did not state that the contract, from which the debt arose, was made within this state, or that all the applicants were residents of the state; and it appeared on the face of the pleadings, that one of the applicants was, in fact, a resident in France.

Held, that the Justices of the Superior Court, from the 1st of January, 1830, until the 1st of July, 1847, had authority, under the provisions of the Revised Statutes, *ag ex officio* Supreme Court Commissioners, to issue attachment against absconding or non-resident debtors.

Held, further, that although the office of Supreme C. Commissioner was abolished from and after the 1st of July, 1847, yet the power of the Justices of the Superior Court to issue such attachments, was preserved and continued to them by the 7th section of the act providing for the election of the Justices of that Court, passed 12th May, 1847.

Held, therefore, that the judge who issued the attachment in question, had jurisdiction.

Held, further, that the attachment, and the proceedings thereon, were not rendered void by the fact, that one of the applicants resided in France, it appearing that the debt was due to them as partners, and that their business, as a

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mercantile firm was conducted in the city of New York, where the partners who managed the business then resided.

The application for the attachment stated, that the debt arose upon a contract, whereby the debtors contracted to sell certain merchandise delivered to them, and account for, and pay over the proceeds to the applicants; but the demand proved upon the trial, and for which the verdict was given, included a sum of money advanced by the applicants to the debtors in the city of New York.

Held, that the sum so advanced ought not to have been included in the verdict, and must be deducted therefrom, as it was no part of the demand stated in the application; and therefore no part of the demand for which the defendant, by virtue of the bond given by him, to discharge the attachment, was liable

(Before DUEK, CAMPBELL, and BOSWORTH, J.J.)

December 8; December 31 1853.

CASE upon exceptions, directed to be heard in the first instance at the general term.

The action was brought upon a bond given by the defendant, to discharge an attachment against the property of L. S. Hargous & Co., merchants of Vera Cruz, as non-resident debtors.

The complaint charged that, upon the written application of the plaintiffs, duly verified pursuant to the statute, and stating that Louis S. Hargous and Emile Voss, co-partners in business, under the firm of L. S. Hargous & Co., were non-residents of the State, and were indebted to the plaintiffs in the sum of \$3,860.92 and upwards, arising upon contract, the Honorable L. H. Sandford, one of the justices of this court, issued the attachment in question, against all the real and personal estate of the debtors within the city and county of New York; that the sheriff, to whom the attachment was directed, in obedience thereto, attached certain property and effects of the debtors, and that the defendant, in order to discharge the attachment, on the 10th of January, 1849, executed to the plaintiffs, and delivered to Mr. Justice Sandford, for their use, a bond or obligation, in the words and figures following. The complaint then set forth the bond at large, which was in the penalty of \$6,721.84, and was conditioned to be void, if the defendant should well and truly pay to the plaintiffs the amount justly due and owing to them from the non-resident debtors, at the time the plaintiffs became attaching creditors, "on account of the debt claimed and sworn to by them in their application for the attachment," with interest, costs, and disbursements.

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apparent repugnancy, will most probably be consistent with the real intention.

If there can be a distinction made between the cases, in which the power to sell upon credit is given by express words, and those in which the words, although general, can only be satisfied by holding that they embrace the power, we must leave it to be made in the Court of Appeals, since we are ourselves unable to see that there is any ground in reason upon which the distinction can be rested.

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Held, that the sum so advanced ought not to have been included in the verdict, and must be deducted therefrom, as it was no part of the demand stated in the application; and therefore no part of the demand for which the defendant, by virtue of the bond given by him, to discharge the attachment, was liable

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The complaint charged that, upon the written application of the plaintiffs, duly verified pursuant to the statute, and stating that Louis S. Hargous and Emile Voss, co-partners in business, under the firm of L. S. Hargous & Co., were non-residents of the State, and were indebted to the plaintiffs in the sum of \$3,360.92 and upwards, arising upon contract, the Honorable L. H. Sandford, one of the justices of this court, issued the attachment in question, against all the real and personal estate of the debtors within the city and county of New York; that the sheriff, to whom the attachment was directed, in obedience thereto, attached certain property and effects of the debtors, and that the defendant, in order to discharge the attachment, on the 10th of January, 1849, executed to the plaintiffs, and delivered to Mr. Justice Sandford, for their use, a bond or obligation, in the words and figures following. The complaint then set forth the bond at large, which was in the penalty of \$6,721.84, and was conditioned to be void, if the defendant should well and truly pay to the plaintiffs the amount justly due and owing to them from the non-resident debtors, at the time the plaintiffs became attaching creditors, "on account of the debt claimed and sworn to by them in their application for the attachment," with interest, costs, and disbursements.

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The complaint then averred, that in the month of June, 1847, they placed in the hands of L. S. Hargous & Co., as their factors and agents, at Vera Cruz, twenty-seven bales of merchandise, and also ten bales twisted cottons, and twenty-eight bags of cocoa; that in the month of August, in the same year, Hargous & Co. sold the cocoa, the net proceeds of which were \$569.80; that in the month of April, 1848, they sold the cotton, the net proceeds of which were \$392.15; and that they had collected and received the proceeds of both sales. That on the 13th April, 1848, Hargous & Co. sold and delivered the twenty-seven bales of merchandise to one E. Stryboss, and received from him as a balance of the purchase money, and for the use of the plaintiffs, the sum of \$5854.82.

The complaint further stated, that Hargous & Co. had shipped and consigned to the plaintiffs at New York, a quantity of ox-hides, with the bills of lading, and averred that they, the plaintiffs, had made advances on account of this shipment, amounting to \$2,830; and that the net proceeds of the sale of the hides, which they made on account of Hargous & Co., as the shippers, was \$2,027.23, leaving a balance due to them of \$802.67.

The complaint then averred that, crediting Hargous & Co. with the proceeds of the sale of the ox-hides, and also with \$4,258.52, the amount of remittances made by them, there remained due to the plaintiffs \$3,368.92, for which sum, with interest, and the costs and disbursements incurred by them on the attachment, judgment was demanded.

The answer admitted, by not denying the execution and delivery of the bond, and also the allegations in the complaint relative to the sale and proceeds of the cocoa and cotton, and the moneys received from Stryboss. It set up the following defences.

1. That the attachment was not applied for, nor obtained, pursuant to the statute, but that the same, and the application therefor, were wholly unlawful,—the contract from which the alleged indebtedness arose, not having been made within the State of New York, and the plaintiffs not having been residents of the State when the contract was made, nor when they applied for the attachment, Pierre Renard, one of the plaintiffs,

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being at that time, and ever since, a resident in France; that the bond of the defendant was, therefore, null and void, having been obtained by an unlawful duress of the property and effects of Hargous & Co.

2. That the ox-hides mentioned in the complaint had been shipped to the plaintiffs on their own account, and at their own risk, and not on account and risk of Hargous & Co.; that they had been purchased by, or under the order of, one Ramsdell, a duly authorized agent of the plaintiffs, who had also directed them to be shipped to the plaintiffs, and that, crediting Hargous & Co. with the advances and payments they had made, on account of the hides, with interest, commissions, and other charges, there was no balance remaining due to the plaintiffs.

The plaintiffs, in their reply, admit that Pierre R. Renard was, and is, a resident in France, but aver, that all the other partners, both when the contract was made and at the time of the application for the attachment, were residents of the State. They deny that Ramsdell had any authority from them to purchase, or direct the purchase of hides on their account, or that Hargous & Co. had any right to believe that he possessed the authority; and aver, that the shipment made to them by Hargous & Co. was wholly unauthorized, and had never been ratified by them.

Upon these pleadings the cause was heard before Mr. Justice Duer, and a jury, in May, 1851.

The plaintiffs, upon the trial, gave in evidence the application for the attachment, which was made and sworn to by Mr. A. Kettletas, one of the plaintiffs. It stated that the indebtedness of Hargous & Company arose upon a contract, "whereby they were to sell certain merchandise delivered to them, and account for and pay over the proceeds to the applicants." The affidavit of two disinterested witnesses annexed to the application, was also read, which stated that Hargous and Voss, each of them, was a non-resident of the State of New York, and a resident of Vera Cruz, in Mexico, and that the plaintiffs (the applicants) carried on business in the city of New York, and that one or more of them was a resident of the State.

The counsel for the defendants objected to the application

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and the proceedings thereon being read in evidence, upon the grounds stated in the answer. The objection was overruled by the court, and the counsel excepted.

The counsel for the plaintiffs then proved the sale by Hargous & Co. of the cocoa and cotton mentioned in the complaint, and the delivery to them of the twenty-nine bales of merchandise, and rested the cause.

The counsel for the defendants then moved, that the complaint should be dismissed, upon the grounds stated in the answer, and upon the additional ground that Mr. Justice Sandfore had no jurisdiction to issue the attachment. The motion was denied, and the counsel excepted.

The controversy relative to the existence of the debt claimed to be due from Hargous & Co., it has appeared from the statement that has been given of the pleadings, turned solely upon the question, whether the plaintiffs were bound to accept the shipment of hides as properly made on their own account, or were justified in treating it as unauthorized, and casting the loss that resulted upon Hargous & Co. A mass of evidence, consisting of the depositions of witnesses, and of a voluminous correspondence bearing upon this question, was given upon the trial; but, as the questions of law arising upon it were not deemed by the court at general term, of much interest or importance, and could not be understood without setting forth the evidence in detail, it has been omitted. It is sufficient to say that, when the evidence was closed, the judge was of opinion, that there were no questions of fact necessary to be submitted, and charged the jury as follows.

First,—That Ramsdell had no authority to make or order on behalf of the plaintiffs, any of the purchases or shipments of hides which had been made, or to draw any of the drafts which he had drawn upon the plaintiffs; and, secondly, that there were no facts or circumstances in evidence, from which the said jury could legally infer the existence of any such authority, or that the plaintiffs had in any way, or to any extent, ratified or adopted the acts of Ramsdell, in respect to the purchase or shipment of said hides, or the drawing of said drafts; and, thirdly, that upon the whole evidence, the jury was bound by

the law of the land to give a verdict for the plaintiffs, for the whole balance claimed in the complaint as due to them, with interest thereon ; to each of which opinions, decisions, and charges on the law, the defendant, by his counsel, did there and then except, and the defendant did then and there insist upon the following objections, to wit :

1. That the sum of eight hundred and twenty-two dollars and sixty-seven cents, claimed by the plaintiffs in their complaint, as due to them by reason of the excess of their charges and advances, over and above the proceeds of the ox-hides, in the complaint mentioned, was not recoverable in this action against the defendant, because, if in fact due, it was not due or owing on account of the debt claimed, and sworn to by the said plaintiffs in their application for the said attachment—such debt so claimed and sworn to, being a contract, whereby L. S. Hargous & Co. were to sell certain merchandise delivered to them, and account for and pay over the proceeds to the said plaintiffs.

2. That the said Ramsdell was at least authorized to invest the proceeds of the cotton and cocoa, amounting to nine hundred and sixty-one dollars and ninety-five cents, in the ox-hides, and, consequently, defendant was entitled to a credit or deduction to that extent, from the debt claimed to be due to the plaintiffs.

The judge overruled the objections, and the counsel excepted.

The jury then found a verdict for the plaintiffs for \$4,099.50, and the judge directed that the exceptions that had been taken should be heard, in the first instance, at the general term, and judgment upon the verdict in the mean time be suspended.

The exceptions were now fully argued by T. J. GLOVER and CHARLES O'CONOR, for the defendants, and G. F. BETTS, for the plaintiff.

BY THE COURT. BOSWORTH, J.—The defendant insists that the proceedings under the attachment are void on two grounds.

1. On the ground that Justice Sandford was not authorized by law to issue an attachment, at the time the one in question was issued. 2. On the ground that it did not appear by the papers on which it was issued, that all the applicants resided in the

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State of New York ; and that it is confessed by the pleadings that, in point of fact, one of them never did reside in this State.

The statute establishing this court was passed on the 31st of March, 1828. (3 R. S., 2d ed. 261.)

The 23d section provides, among other things, that, "the said justices, and each of them, shall moreover be, and they are hereby authorized to perform all the duties which the justices of the Supreme Court, out of term, are authorized to do and perform, by any statute of this State : " P. 264.

The defendant's counsel insists that this section speaks as of the time the act of 1828 took effect, and that if a statute should subsequently be passed, authorizing the justices of the Supreme Court to do acts, out of term, which they had no previous authority to perform, the justices of this court would not be authorized, by any fair construction of this section, to perform such acts.

Even if this be the true construction of the section, it would follow, that any justice of this court, by force of § 23 of the act of 1828, may do any act which a justice of the Supreme Court could perform, out of term, when that act took effect, unless the authority conferred by it has been subsequently restricted or abrogated.

When the act of 1828 took effect, a justice of the Supreme Court was authorized to issue attachments against non-resident debtors. (1 R. L. of 1813, p. 157, § 1.)

Power and authority to grant attachments, in such cases, was therefore conferred on a justice of this court at the time of its creation.

The existing statute, in relation to attachments in such cases, was passed on the 4th of December, 1827, and took effect on the 1st of January, 1830. It is a re-enactment of the pre-existing law on the same subject, with some modifications and additions. (2 R. S., p. 3.)

By the revised act, the justices of the Supreme Court and the chancellor, were relieved from the duty of entertaining applications for such attachments. (2 R. S., p. 35, § 1 ; 3 R. S., 2d ed., p. 621.)

The act of 1801, found in 1 R. L., p. 157, was repealed from and after the 31st of December, 1829, as were all acts amend-

ing the same, or relating to the subject matter thereof. (3 R. S., p. 151.)

A justice of the Supreme Court, from and after the 1st of January, 1830, until the 1st of July, 1847, could not issue such an attachment. (Laws of 1847, vol. 1, p. 323, § 16, and p. 343, § 76.)

The section of the revised statutes designating the officers who may grant such attachments, does not include within the number "a justice of the Superior Court," by that title or description. "Supreme Court Commissioners" are among the designated officers. A justice of the Supreme Court is not of the number. On and after the 1st of January, 1830, there was not any statute of this State existing which authorized any justice of that court to perform such an act. Before that day, all pre-existing statutes, relating to the issuing of attachments in such cases, had ceased to exist. The act of 1801 (1 R. L., p. 157) being repealed, a justice of this court could not issue an attachment under it, and the R. S. having taken effect on the 1st of January, 1830, and containing in itself all the statutory law, then relating to the subject matter thereof (3 R. S., p. 151), a justice of this court, as such, could not issue an attachment under the revised statutes, for the reason that no such officer is named in § 1, p. 35 of 2 R. S.

By another section of the revised statutes, the justices of this court were declared to be, by virtue of their office, "Supreme Court Commissioners," and were "required to perform all the duties herein conferred on such commissioners;" subject to all the provisions of the title, in which that section is found, except that they were prohibited from making any order in any cause or matter pending in the Supreme Court. (2 R. S., p. 281, § 33.)

The grant of power made by this section is in the precise phraseology of that, making every recorder of a city, and every judge of a county court of the degree of counsellor in the Supreme Court, by virtue of their respective offices, Supreme Court commissioners; except that in the latter, the concluding clause omits the words, "on such commissioners." (Id. § 32.)

There is nothing in that title conferring authority on a

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"Supreme Court Commissioner," to issue such an attachment. It is not by force of any grant of power found in that title, that a Supreme Court commissioner could claim any such power. If that officer had not been included among those enumerated in 2 R. S., p. 35, he would have had no authority to issue such an attachment. (2 R. S., p. 280, § 19.)

But recorders of cities, and judges of county courts, though made, by virtue of their offices, by § 32 of 2d R. S. 281, Supreme Court commissioners, are specially named in the act which enumerates the officers, who may issue such attachments.

It is somewhat singular that the latter section should, in addition to specifically designating Supreme Court commissioners, name every officer who, by § 32, was then *ex officio* a Supreme Court commissioner, except a justice of the Superior Court of the city of New York.

It may be urged, that as recorders of cities, and as judges of a county court, of the degree of counsellor at law, were expressly authorized, as such, to grant attachments, they were so authorized, not as Supreme Court commissioners, but as recorders and county judges. This would indicate that the words, "Supreme Court commissioners," as used in that section, were meant to designate only that class of persons who were nominated and appointed as such by the Governor, with the consent of the Senate. (1 R. S., 96 & 107, § 15.)

I think it quite evident, that as all laws authorizing the issuing of attachments against non-resident debtors, in force when this court was created, ceased with the 31st of December, 1829, to exist, and with them every statute authorizing a justice of the Supreme Court to grant it; the only authority of a justice of this court to entertain an application, after the 31st of December, 1829, was derived from the act, making them *ex officio* Supreme Court commissioners, and the section allowing Supreme Court commissioners to grant such attachments. This construction makes it necessary to assume, in order to affirm the existence of the power, that the words Supreme Court commissioners, as used in that section, include as well officers who were *ex officio* such, as those appointed such by the Governor, and which construction is not necessary to confer the authority on any other *ex officio* Supreme Court commissioner

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than justices of this court. Such a construction should be given, if maintainable, for the reasons, that such is the practical construction the section has received from January, 1830, to July, 1847. The consequences of holding all proceedings *coram non judice*, and void, which have been had with the fullest confidence that such was the true construction, would be so serious, that a new construction, which should produce them, should not be given, unless absolutely unavoidable.

Assuming, then, that a justice of this court, on and after the first of January, 1830, by virtue of being *ex officio* a Supreme Court commissioner, had the authority, the question remains, Has the authority been abrogated, or does it yet continue?

Section 8, of Art. 14, of the present constitution, abolished the office of "Supreme Court Commissioners" from and after the 1st of July, 1847. (Laws of 1847, vol. ii., p. 411.) From and after the 1st of July, 1847, therefore, a justice of this court, in the absence of all legislation upon the subject, could have no authority to do any act, which he could previously perform only and solely by reason of his being *ex officio* such a commissioner. Ceasing to be such an officer, all the authority that he could exercise only by reason of being such an officer, would be abrogated by the extinction of the office. But up to the 1st of July, 1847, by force of the act creating him *ex officio* a Supreme Court commissioner, and of the act authorizing such a commissioner to issue such attachments, he had power to grant them.

On the 12th of May, 1847, an act was passed to elect the justices of this court. The seventh section provides that "The justices of the Superior Court, whose election is provided for by this act, shall have and possess the same powers, and perform the same duties as the justices of that court now have, and possess, and perform."—Laws of 1847, p. 281, § 1.

When that act was passed, they had and possessed the power to issue such an attachment. We think the legislature did not intend to exonerate them from the performance of that duty. That this section was designed to confer, by its comprehensive phraseology, on the justices to be elected, all the powers which those then in office exercised and possessed, whether such powers

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related to statutory proceedings, or to actions instituted in the court of which they were members.

It is true that § 76 of the Judiciary Act required all proceedings of this kind, pending before any Supreme Court commissioner, on the first Monday of July, 1847, to be transferred to one of several officers named in it. But the transfer, by that section, might be made to an "officer now [then] authorized to hear and determine such suit or proceeding, or who shall continue in office after the day last aforesaid."—Laws of 1847, p. 343.

A justice of this court was such an officer. He was to continue in office until the 1st of January, 1848. (Laws of 1847, p. 280, § 3.) He had such power and authority at the time the Judiciary Act was passed, viz. May 12, 1847. (Id., p. 319; id., p. 343, § 76.) He was to remain invested with the same power after the 1st of January, 1848, if the construction which we have given to § 7 of the act of May 12, 1847, be correct. (Id., p. 281, § 7.) We think, therefore, an attachment could properly have been issued by a justice of this court at the time the one in question was granted.

Was there a defect of jurisdiction, because it did not appear, by the papers on which the attachment issued, that all the joint creditors applying for it resided in the State of New York?

The application does not state where the contract was made, on which the alleged indebtedness arose. It describes all the applicants as being "of the city of New York," and concludes by stating that "your applicants, or some of them, reside in the state of New York," and that the persons proceeded against "reside at Vera Cruz and Mexico."

The affidavits of the two witnesses testify to the facts, that the persons indebted are residents of Vera Cruz, or elsewhere, in the republic of Mexico, and that the "applicants carry on business in the city of New York, and one or more of them is a resident of the state of New York." It does not appear, by the papers, where the contract was made, nor where the debtor resided at the time it was made.

The complaint describes the contract as having been made in Mexico and that P. F. Renard, one of the applicants, did

not reside in the state of New York when the contract was made, nor at any time thereafter, nor at the time the attachment was applied for.

The reply asserts, that the attaching creditors were partners, were doing business, as such, in the state of New York, when the contract was made; that some of them were then citizens and residents, and were so at the time of applying for the attachment; and insists that the non-residence of one member of the firm did not render the attachment void.

It was decided, in the matter of *Brown* (21 Wend. 316), that the only fact to which the two witnesses need testify, is the non-residence of the debtor, and that they need not testify to the residence of the creditor, nor anything in relation to the contract. BRONSON, J., said, "The fact that there is such a debt, and such a creditor as the statute specifies, may be established by other evidence."—P. 319. In that case, the application stated that the demand arose upon contract made within this state. The evidence of the parties' own oaths was furnished, that such a contract had been made as warranted the attachment, no matter where the creditors resided. In the case before us, for aught that appears, the contract may have been made within this state, but the fact is not affirmatively stated.

In *Staples v. Fairchild* (3 Coms. 41), while the court held that the only fact, required to be proved by the two witnesses, was that of the non-residence of the debtor, yet, it also held that the proceedings were void, because the application did not affirmatively state, either that the contract was made within this state, or that the creditor resided within it. As the papers in question do not state that the contract was made in this state, it is indispensable to the acquisition of jurisdiction, that they should, in order to satisfy the statute, in some form allege that the creditor resided in this state. The attaching creditors constituted a firm. Its place of business was within this state; and the members of the firm actually controlling the business were citizens and residents. So much is shown by the papers. Is this sufficient to give jurisdiction?

2 R. S. 36, § 8, provides that, "whenever partners are creditors of any debtor, any petition and affidavit required by the

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preceding articles, of creditors, may be made and signed by either of the partners."

§ 9 requires of creditors, residing out of this state, but within the United States, further evidence of the contract on which their demand arises, than is required of resident creditors.—*Vide* § 11 *id.*

Suppose that P. F. Renard had resided in Connecticut, or any other of the United States, instead of being a resident of Paris, would any other evidence in relation to the contract have been required, than such as is required, when all reside within the same state?

Does § 9 (2 R. S., p. 36) require that the creditors authorized by it to "unite in any petition" should all reside "out of the state," in case they constitute a firm? If so, and if the construction contended for by defendant's counsel be correct, then it follows that if a partnership is a creditor, though all its members reside "within the U. States," yet, if some of the members reside within, and some out of this state, they cannot unite in a petition with a resident creditor, under § 3, 2 R. S., p. 3, for the reason that all the members do not reside out of the state; and they cannot apply alone, for the reason, that all do not reside within the state. On such a construction, the rights of a firm, all of whose members reside out of the state, would be superior to those of one transacting business in the state, under the sole control of resident partners, but having one of the firm residing out of the state.

Does not a case fall both within the letter and the spirit of the act, which presents a firm, as the petitioning creditors, whose place of business, and the property connected with it, are within the state, under the actual control and management of citizens and residents, although one or more of the members may reside out of the state? Or must every member be a resident creditor, in all cases where the contract was not made within the state?

Those of the applicants, who reside within this state, were creditors of the persons proceeded against, and were creditors by reason of the demand on which the attachment issued. One of the applicants, who resided out of the state, was also a creditor, by reason of being a member of the firm with which

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the contract was made. But a partnership being the creditor, its place of business being here, and its business being controlled and managed by the creditors who resided here, and who applied for the attachment, we are of the opinion that the proceedings should not be held void, merely because one of the partners resided out of the state. That the act should be liberally construed in this respect, and proceedings under it not be held void, by the adoption of that limited construction for which the defendant contends.

The other questions that were discussed by the counsel, we think, are free from difficulty.

We entirely agree with the judge who tried the cause, that the evidence clearly shows that Ramsdell had no authority to make any purchase or shipment of hides on account of the plaintiffs, or to draw the bills which he drew upon them; and that no facts or circumstances were proved, from which the jury could legally infer that he possessed such authority, or that the plaintiffs had, in any manner, adopted or ratified his unauthorized acts. The plaintiffs were, therefore, entitled to a verdict for the whole balance of the moneys which Hargous & Co. had collected and received on their account; but we are all of opinion that the judge erred in directing the jury to include in their verdict the sum of \$802 $\frac{67}{100}$, which was the balance of the advances made by the plaintiffs, in New York, upon the shipment of iron. The demand of the plaintiffs, as sworn to in their application for the attachment, was limited to the proceeds of the merchandise which had been placed in the hands of Hargous & Co., at Vera Cruz, for sale. The sum advanced by the plaintiffs in New York assuredly constituted no part of these proceeds, and, therefore, constituted no part of the demand, which the defendant, by the condition of his bond, if established, was bound to satisfy.

The plaintiffs must consent that this sum of \$802.67 shall be deducted from the verdict, or there must be a new trial. If they make the deduction, they will be entitled to judgment upon the verdict, as reduced, with costs.*

* The plaintiffs consented to the deduction, and the amount of the verdict was adjusted by the counsel of the parties.

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The policy of insurance, on which the action was brought, contained a provision, that, in case of any loss or damage by fire, to the property insured, the plaintiff should forthwith give notice thereof to the defendants.

The complaint averred that the property insured was destroyed by fire on the 20th of May, 1852; and that as soon as possible thereafter, that is to say, on the 24th May, 1852, the plaintiffs gave notice thereof to the defendants.

Held, that the plaintiffs were not precluded by the terms of their complaint from showing on the trial that the proper notice was given on the morning of the 21st May; and

Held further, that this notice satisfied the provision in the policy.

The policy bound the plaintiffs to keep and maintain a night-watch on their premises during the continuance of the policy.

Held, that evidence offered by the defendants upon the trial, of a parol agreement that the night-watch employed by the plaintiffs should have the care and watching of no other premises at the same time, was properly rejected.

The defendants, upon the trial, required the judge to charge, that the employment of a person as a night-watch, whose duty was in any manner divided by an employment to watch other premises, was not a fulfilment of the condition in the policy.

The judge refused so to charge, but charged the jury that if the night-watch employed by the plaintiff was employed to act exclusively upon their premises, and was a competent and proper person to be so employed, and did keep exclusively on the plaintiffs' premises in the faithful discharge of his duty, and the plaintiffs were ignorant of any engagement made by him with other persons, then the mere facts that he had made such an engagement, and had rendered services under it, would not be a bar to the plaintiffs' recovery.

Held, that the refusal of the judge to charge as required, and the charge which he actually gave, were correct.

The jury having found the facts submitted to them in favor of the plaintiffs,

Held, that their judgment could not be disturbed.

(Before DUEK, CAMPBELL, and BOSWORTH, J.J.)

December 23; December 31, 1853.

MOTION, on the part of the defendants, for a new trial, upon exceptions, and also upon the ground that the verdict was against evidence.

The action was upon a policy of insurance against fire, and was brought to recover the sum of \$2,500, which was alleged to be the amount of the loss which the plaintiffs had sustained, by reason of the destruction, by fire, of the property insured.

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The plaintiffs carried on business under the name of the "Williamsburgh Oil Company," and the insurance was on their stock of raw materials, as oil manufactures, manufactured oils, bright varnish, and oil cakes, contained in the shed and yard, and on the stock of said company, situate, &c., Williamsburgh, Long Island." The policy stated, *inter alia*, that it was understood and agreed between the parties, "that there should be a night-watch upon the premises during the continuance of the policy," and also that, in case of any loss or damage by fire, the plaintiffs should forthwith give notice thereof to the defendants.

The complaint was in the usual form, averring the execution and delivery by the defendants of the policy, its substance and conditions, the destruction by fire of the property insured, the amount of the loss, and that due notice and proof thereof had been given to the defendants.

The answer admitted the execution and delivery of the policy and the happening and amount of the loss, as set forth in the complaint, and set up as defences; First, That the plaintiffs did not, as they averred in their complaint, and as they were bound to do by the terms of their contract, notify the defendants forthwith of the loss and fire, but, on the contrary, had failed to give to the defendants any notice whatever of the fire, until several days after its occurrence; Second, That the plaintiffs had not at all times, during the continuance of the policy, kept and maintained a night-watch upon the premises described therein, containing the property insured, as they had stipulated and agreed to do by the said policy.

Upon these issues the cause was tried before Bosworth, J., and a jury, in June term, 1853. The following were the proceedings on the trial.

The plaintiffs, to prove the issue on their part, offered in evidence the policy of insurance, and the same was read to the jury, being the same policy recited in the plaintiffs' complaint.

The plaintiffs, further to prove the issue on their part, called as a witness,

Peter Pierce, who, being duly sworn, testified as follows:

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I was in the employ of the plaintiffs in the month of May, 1852, as general superintendent, and was on the premises in question at the fire, on the night of the 20th of May. I went into Mr. Edwards's office (he being the defendants' agent), on the morning of the 21st day of May, 1852. Here the counsel for the defendants interrupted the witness, and asked the plaintiffs' counsel what he designed to prove by him as having taken place on the 21st of May, 1852, at the office of defendants' agent, to which the counsel for the plaintiffs replied that he expected to prove the notice to the defendants of the occurrence of the fire the day following the occurrence. To this the counsel for the defendants objected, on the ground that the complaint averred that the first notice to the defendants of the occurrence of said fire was given on the 24th day of said May, and the insufficiency of the notice set forth in the complaint was relied upon in the answer of the defendants as one of the grounds of defence. The court overruled the objection to the admissibility of this evidence, and the defendants' counsel duly excepted to the said decision of the court, and the exception was duly noted. The witness then proceeded. "Mr. Edwards was not in. I asked if that was the agency of The American Mutual Insurance Company. The clerk said, yes. I then asked if the Williamsburgh Oil Factory was insured in their office. The young man turned to the books and said, yes. I then asked him the amount, and told him of the fire the night previous. On the 24th, I gave written notice of the loss to Edwards, and also sent notice to the company at Amsterdam. I came into the employ of the plaintiffs, January 10, 1852. Mr. Paige was in their employ when I came, and continued some time after. When I went into the employment of the plaintiffs, Mr. Bond was the night watch, and remained there in that capacity till the 1st of March, and then his son went to Brooklyn, and the old man with him. Then Mr. Newton hired Patrick Mead, who remained until after the fire. There was a night watch from the time I went into their employ. He, as well as Bond, is an honest, intelligent, and proper man for a night watch. Mead was paid four dollars a week. Bond was paid four dollars a week.

Upon being cross-examined, the witness testified: "I am

not now employed in the oil factory, but am engaged for myself in the paper business. I remained in the plaintiffs' employment until the end of the month after the fire. The plaintiffs are not now in business anywhere. I did not state that I was unable to find the office of the defendants after the fire; it was another office that I stated I was unable to find. Mr. Bond was employed to remain on the premises during the night hours. I do not know of his sons sleeping there. Mr. Mead was hired at the yard. I was not present when the bargain was made. I examined his recommendations. Don't remember whose they were. He was watching a ship in New York at the time he came. He had quit the ship and was out of employment. Mr. Newton hired him."

And further to prove the issues on their part, the plaintiffs called as a witness,

Madison Page, who, being sworn, testified as follows: I was in the employment of the plaintiffs at the date of the policy, and acted for them in obtaining it. I had then been in their employment five months. I put a night watch on the premises on the 19th of June, the date of the policy, and continued the same up to February, 1852. He was a good, faithful watch; his name was Bond. The duties of a night watch are to be on the ground at six o'clock in the evening, and remain till seven in the morning. This was performed, I think faithfully, up to February, 1852.

Upon being cross-examined, the witness testified: Mr. Bond had a son who slept on the premises. Mr. Hovey desired me to have one of the workmen sleep on the premises to keep the watchman company.

And further to prove the issue on their part, the plaintiffs called as a witness,

Charles H. Newton, who, being sworn, testified as follows: I went into the plaintiffs' employment on the 13th of September, 1851, and continued with them until after the fire. There was a night watch there when I went, and he continued till the 1st of March. His name was Bond. The night Bond left I watched, and I put Patrick Mead as night watch there the

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following night, who continued there up to the time of the fire, and was there that night. His business was to look around the yard. He was to go on the premises at six in the evening, and remain till seven in the morning. I supposed him a competent man. He brought good recommendations from a captain in New York. We paid him four dollars a week. So far as I know he performed his duty well. I was there sometimes in the night myself.

Upon being cross-examined, the witness testified: Mr. Mead was not in any one's employment when I employed him, as he said the last person for whom he was employed was the captain. He brought a recommendation from him. I did not know this captain, but I thought I knew enough of Mead before. He was formerly employed in the yard of Perrine, Patterson, and Stack. I did not go there to inquire about him. I should think it was a month before that I saw him occasionally at the yard of Perrine, Patterson, & Stack.

The amount of the damage by the fire to the property insured being admitted to be as the same is averred in the complaint, the plaintiffs' counsel here rested.

And the defendants, to prove the issue on their part, called as a witness,

William Perrine, who, being sworn, testified as follows: I am one of the firm of Perrine, Patterson & Stack. I know the premises of plaintiffs. Our premises are contiguous, in the same block below, and in the next block above. I know Patrick Mead. He is now in court. He is in our employment as a night watchman. He has been in our employment as such since 1849 or 1850. He was at our yard as our night watch in March and April, 1852. I am not sure that he was in our employ in March. We built the "John Stewart." Mead was liked by the captain. We allowed him to go to accommodate the captain. I can't tell when he came back. We allowed him \$10 a month until we got more to do; since then we have paid him \$1 per night. He was in our employment, at the yard of Perrine, Patterson & Stack, at the time of the fire, which consumed the oil factory. We paid him ten dollars a

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month. His duties were to go round and be walking about our premises from about half past 5 p.m. until about 7 a.m., when he was relieved by the day watch. I have no knowledge of the employment of Mead at other premises, but I believe Mr. Stack consented, on account of the small wages we were then paying him.

Upon being cross-examined, the witness testified: As soon as we got two or three vessels on the stocks, I think about the first of July, we raised Mead's wages. The plaintiffs' premises are in sight from ours. To go into our saw-yard, or to look into it, the watchman was obliged to go around the buildings. We had no other night watchman on our premises than this man Mead. When he was watching the ship in New York, we had but one vessel just going up, and had but little necessity for a watch. I don't know that I saw Mead away from the plaintiffs' yard any one night. The reason why we paid him at the time such low wages, was that we then had but one vessel to watch. The ordinary wages of a night watchman are six dollars a week in the summer, and seven in the winter. I can't recollect whether I saw Mead on the plaintiffs' premises or my own from April 1st to the time of the fire.

And the defendants, further to prove the issue on their part, called as a witness,

Alfred Edwards, who, upon being sworn, testified as follows: I was the agent of the defendants when the policy was made, and made the contract with Mr. Paige.

The counsel for the defendants here offered to prove by this witness the conversation had between the parties at the time of making the policies, as to the night watch to be kept on the premises; and that, by the express terms of the agreement, the "night watch," employed upon the premises by the plaintiffs, was to have the care and watching of no other premises at the same time, but that he was to be the exclusive night watch of the plaintiffs, upon their premises. To this the counsel for the plaintiffs objected, and the said objection was sustained by the court, and said evidence was not admitted; to which decision of the court the counsel for the defendants did then and there except, and said exception was duly noted.

The defence here rested.

And the plaintiffs, further to prove the issue on their part, recalled the witness,

Charles H. Newton, who testified as follows: I was never informed that Mead was employed by any one else as night watchman. When he was employed by the plaintiffs I never heard him say anything about his wages.

And further to prove the issue on their part, the plaintiffs recalled

Pierce, who testified as follows: I did not know of Mead's being employed elsewhere, at the time he was employed by the plaintiffs.

And further to prove the issue on their part, the plaintiffs recalled as a witness,

Patrick Mead, who, upon being sworn, testified as follows: I was employed by the Williamsburgh Oil Factory, as night watchman, and was there at the time of the fire. I was never off the premises one night. I was in Mr. Stack's employ three or four years. I told Stack I was employed by the oil factory. The captain asked me to watch the ship. After I left the ship, Newton employed me for the oil company. He told me to keep an eye on their yard when I was going backward and forward, and he would make it all right with me. My boy could look out for Stack's place. It did not prevent my doing my duty. I always kept on the ground of the oil factory.

And upon being cross-examined, the witness testified: The vessel was nearly built in Mr. Stack's yard, at the time of the fire at the oil factory. They had no other night watchman at the shipyard besides myself. I agreed to watch the premises going back and forward. I did not go into Stack's yard. I could see Perrine's yard without going off the premises. There was no other man but myself to watch the ship then nearly finished. I never told Newton or Pierce anything of my employment by Perrine & Stack. I could see over the fence

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almost all the way. I used to look over the fence. I could get on barrels and look over it.

Here the case rested, and counsel on either side summed up, and the court then proceeded to charge the jury.

The counsel for the defendants requested the court to charge the jury as follows.

1st. That the obligation of the plaintiffs to keep a night watch on the premises during the continuance of the policy was a condition precedent to the liability of the defendants, and to entitle the plaintiffs to recover, they must prove a literal performance of that condition.

2d. That proof of the employment of a person as a night watchman, whose duty was in any manner or to any extent divided by an employment at the same time to watch other premises, is not such proof of the performance of the condition as the law requires, and is insufficient to entitle the plaintiffs to recover in this action.

Upon the first point the court charged the jury according to the request of the defendants' counsel, but refused so to charge upon the second point. But the court charged the jury, that if they found upon the evidence that the plaintiffs employed Meade to act exclusively as a night watch upon the premises in question, and that he was a competent and proper person to be employed for that purpose, and that he did keep exclusively on the plaintiffs' premises in the faithful performance of his duties as night watch, and they were ignorant of the engagement which he had made to Perrine, Patterson & Stack, then his having made the engagement with them which he testified he made, and having rendered for them only such services as he testified he rendered, would not be a non-compliance with the condition which would preclude a recovery by the plaintiffs in this action.

And to such refusal of the court, and to the said charge of the court, the defendants' counsel then and there excepted, and the exception was duly noted.

Under this charge, the jury found a verdict for the plaintiffs for \$2,650.

The case made to set aside this verdict was now submitted by the counsel of the parties.

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T. W. Tucker, for plaintiffs.

I. Evidence of conversation between the parties, at the time of making the policy, and of an oral agreement different from that expressed in the policy, was inadmissible, and properly excluded. (1 Greenleaf Ev. § 275-281.)

II. There was no proof that the duty of the night watchman employed by plaintiff was in any way divided by any other employment.

III. The charge of the judge was correct.

F. H. Upton, for defendants.

I. The court erred in allowing the plaintiff to prove notice to the defendants, of the occurrence of the fire the day following its occurrence, and in overruling the objection of the defendant's counsel to said evidence. The complaint avers—first, the obligation of the plaintiffs by the terms of the contract, to notify the defendants “forthwith” of any loss or damage by fire to the property insured—and “as soon thereafter as possible,” to deliver to them a particular account of the same. Secondly, that the fire occurred on the 20th of May, 1852; and thirdly, that on the 24th day of May, they gave notice of the fire to the defendants. The answer of the defendants denies that the plaintiffs notified them “forthwith” of the occurrence of the fire, as they were bound to do by the contract. Here was an issue between the parties, of fact or of law, as it should appear at the trial—of law, if it should be contended that a notification four days after the fire, was a notification “forthwith,” within the legal construction of the contract between the parties—of fact, if the plaintiffs should prove facts or circumstances tending to show the impossibility of giving notice at an earlier period. The defendants came to the trial prepared to meet the issue, upon the averment of the complaint that notice of the fire which occurred on the 20th was given on the 24th. But the plaintiffs were allowed to prove, in direct variance from their averment, that notice was given on the 21st,—and the defendants were thus deprived of all opportunity of showing the contrary by proof, which they might otherwise have produced. The plain-

tiffs, even at the trial, would undoubtedly have been allowed to amend their complaint, upon motion, by averring notice on the 21st; but in such case, the motion would, of necessity, have been granted upon terms, and such terms at least as would have given the defendants an opportunity to meet the averment. No such amendment was made, nor was there any motion to that effect, and the complaint now stands with the allegation, that notice of the occurrence of the fire, which took place on the 20th of May, was given to the defendants on the 24th, and the plaintiffs were allowed to prove, without amendment, that notice was given on the 21st. This was a most material variance, affecting the substantial rights of the defendants, not a mere matter of form. A notification "forthwith" by the assured to the insurers of the occurrence of a fire, is one of the most important and imperative conditions of the contract of insurance. It is inserted in all policies of Fire Insurance, and is essential for the protection of the rights and interests of the underwriters. In the first place, it enables them immediately after the occurrence of a fire, and while everything is fresh in the recollection of the witnesses or persons in the neighborhood, to institute the requisite inquiries into its causes, and obtain facts in reference thereto, which may tend to exonerate them from all liability. The delay of a day or two, to give the notice in a community like this, is sufficient oftentimes to defeat the very purpose of its requisition. In the second place, the notice "forthwith," enables the underwriters to take measures for the preservation of their interests in the seasonable care and custody, and restoration of such of the property insured as might be saved from the elements, and thus by their own vigilance, converting into a partial, what might otherwise be a total loss. In this view of the true interest and meaning of this most important condition of the contract, it has been repeatedly decided that a notification "forthwith," means "immediately," "directly," "without delay," and that where it is not made immediately, directly, and without delay, and no circumstances are proved, the existence of which rendered the delay unavoidable, and therefore excusing it—no liability on the part of the underwriters can be predicated upon such

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notice. (*Inman v. Western Fire Ins. Co.*, 12 Wendell, 452, and cases there cited.)

II. The court erred in refusing to allow the testimony of the defendants' agent of the conversation between the parties at the time when the contract was made, as to their precise meaning in the condition inserted in the contract, "to keep a night-watch upon the premises." That this condition, as expressed in the policy, is not sufficiently obvious and unambiguous upon the face of the policy, is apparent, as well from the language, as from the fact that much testimony was given at the trial on either side, without objection, explanatory of its meaning, and of the peculiar duties of a night-watchman. This being the case, was not the very best evidence of the true intent and meaning of the condition, the conversation of the parties at the precise time when the stipulation was made and the clause inserted?

III. The court erred in charging the jury, that "if they found upon the evidence that plaintiffs employed Mead to act exclusively as a night-watch upon the premises in question, and that he was a competent and proper person to be employed for that purpose, and that he did keep exclusively on the plaintiff's premises, in the faithful performance of his duties as night-watch, and they were ignorant of the engagement which he had made to Perrine, Patterson, and Stack—then, his having made the engagement with them, which he testified he made, and having rendered for them only such service as he testified he rendered, would not be a non-compliance with the condition which would preclude a recovery by the plaintiff in this action. 1. It is conceded, and the court so charged the jury, that the condition of the contract on the part of the plaintiffs to keep a night-watch upon the premises, was a condition precedent. A literal compliance with this condition is, therefore, necessary to entitle the plaintiffs to recover—a substantial compliance is wholly insufficient—and whether the loss was in any way attributable to, or connected with the failure to make literal compliance with the condition, is quite immaterial and cannot be inquired into. 2. It is conceded, as the charge of the court intimates, that the compliance with this condition by the

plaintiffs, required their employment of a competent person to watch their premises exclusively. This is obviously the true construction of this most important condition. The property insured was of such a combustible character as to require constant and unremitting attention in the night-time—without an express stipulation for such an attention and watching exclusively of this property, the underwriters would not have entered into any contract of insurance at all. Now, if the person employed by the plaintiffs to watch their property in the night-time, was at the same time, and for the same sum, employed to watch the neighboring property, in the night-time, it is certain that he was not a night-watch exclusively for the plaintiffs' property; and although he might have been continually on some part of their premises, at whatever distance from the point at which danger was most to be apprehended, yet, if by his engagements, it was equally his duty to watch the adjacent ship-yard, it is obvious that he had a divided duty, and that he was not a night-watch of the premises of the plaintiffs exclusively, and therefore, however faithfully he might have performed his divided duty, the condition of the contract was not complied with. He was not the exclusive night-watch of the plaintiffs. The necessity imposed upon the watch by his divided engagements, might have been the actual cause of the loss. The fire might have kindled while his attention was directed in compliance with his duty towards the property of Perrine, Patterson & Stack, and although at the time he might have been strictly on the plaintiffs' premises, yet he might have been, and if watching the ship-yard, he necessarily would have been, at such a distance from the spot where the fire broke out, as to render its extinguishment by him impossible (the property being highly inflammable in its nature), whereas, had he been near the point of danger, as he would have been, but for the division of his duty, he might have seen the first spark, in season to have saved the property. 3. The ignorance of the plaintiffs, that the night-watch employed by them was not watching their premises exclusively, surely furnishes them with no legal excuse for a non-compliance with the condition of the contract. In other words, the plaintiffs' ignorance that their watchman was employed by others to watch their property at

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the same time that he was watching that of the plaintiffs, cannot constitute a literal compliance with the condition, which would not have been literally complied with, but for that ignorance. But, is not this in effect the conclusion of the court? The judge says, "If the plaintiffs were ignorant of the engagements of their night-watchman, then his having made such engagements, and actually complying with them, would not be a non-compliance with the condition which would preclude the recovery by the plaintiffs. Is not this a declaration that the plaintiffs, so long as they act in good faith, and employ a person to watch their property exclusively, and innocently believe him to be thus employed, are not to be held responsible for the neglect or bad faith of their agents thus employed? It is obvious, from the testimony of Mead, the watchman, that he kept his employment by Perrine, Patterson & Slack, carefully concealed from the plaintiffs. Why was this, but for the reason that he knew that by such an engagement he was violating his agreement to watch their property exclusively? Was not this bad faith on the part of Mead? Had the plaintiffs known of his other engagement, and connived at it, or allowed it, will it be pretended that they could recover in this action, as upon proof of a literal compliance with this essential condition precedent of the contract? It is conceded that they could not, by the terms of the charge of the court. Are they not then accountable for the bad faith of their agent? and is their ignorance or innocence of this bad faith of their servant to be held to convert a manifest and admitted breach of the condition of the contract, into its literal compliance?

BOSWORTH, J.—The first point made on the appeal is, that the court erred in allowing proof that notice of the fire was given the day after its occurrence, and in overruling the objection of the defendants' counsel to such evidence.

The policy required that the assured, on "sustaining loss or damage by fire, should forthwith give notice thereof to the company." The fire occurred in the night of the 20th of May, 1852. The complaint avers, "that as soon as possible after said fire, that is to say, on the 24th of May, 1852," the plaintiffs gave notice of the same to the defendants. The answer denies

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“that the plaintiffs did, as they aver in their complaint, and as they were bound to do by the terms of said contract, notify them of said loss and of said fire, but, on the contrary thereof, they failed to give the defendants any notice whatever of said fire, until several days after its occurrence.”

It will be seen that the answer treats the complaint, as having, in substance, averred, that notice was forthwith given of the loss; denies the truth of such allegation, and affirms that, no notice whatever was given of said fire, until some days after its occurrence.

When the plaintiffs offered to prove that notice was given to the agent of the company, at their office in this city, where the policy was effected, on the morning of the 21st of May, the evidence was objected to. No objection was made as to the mode of giving it, or that it was not given at the proper place, nor that the notice given that morning was not sufficient, without other or further notice of the loss. The objection taken was, that the plaintiffs, by their complaint, had precluded themselves from proving that any notice had been given, except on the 24th of May. We think the particular objection made to the admission of the evidence untenable. The complaint averred, that notice was given as soon as possible, to wit, on the 24th of May. The answer treated it as an allegation that notice had been given forthwith, and denied that it had been given forthwith by the plaintiffs, “as they aver in their complaint.” Not content with this, it proceeds to assert that, on the contrary, the plaintiffs “failed to give the defendants any notice whatever of said fire, until several days after its occurrence.” The evidence objected to was directed to this averment, and tended to prove that notice was not only given as soon as possible, but forthwith.

No point was made that the notice actually proved was insufficient, if evidence of it was admissible under the pleadings. The court was not asked to charge the jury that the notice was given so late as to exonerate the defendants from liability, or that it was insufficient, in any respect. The only point made was, that it was not competent for the plaintiffs, under the pleadings, to prove that notice was given, on the

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morning after the fire. We think the objection was properly overruled.

The second point taken is, that the court erred in refusing to receive evidence of the conversation between the parties, at the time the policy was made, as to the night watch to be kept on the premises,—and that, by the express terms of the agreement, the “night watch” was to have the care and watching of no other premises at the same time, but that he was to be the exclusive watch of the plaintiffs upon their premises.

The answer avers, “that in and by the aforesaid contract or policy of insurance, it was stipulated and agreed that the plaintiffs should, at all times during the continuance of said policy, keep and maintain a night watch upon the premises described therein, and containing the property which was the subject matter of the said insurance,” and alleges that they did not do so.

The answer did not allege, that any agreement was made different from that evidenced by the policy. The defendants did not offer to prove, that by any established or known usage, the term “night watch” was understood to impose any duties in addition to, or different from, those plainly indicated by the contract described in the policy, or by the natural meaning of the words by which it was described. If the object of the evidence was to vary the necessary legal effect, or the terms of contract, contained in the policy, it was properly rejected.

The only remaining point taken, brings under consideration the only part of the charge to the jury which was excepted to by the defendants.

The court charged as requested, that the obligation of the plaintiffs to keep a night watch on the premises during the continuance of the policy, was a condition precedent to the liability of the defendants, and to entitle the plaintiffs to recover, they must prove a literal performance of the condition. To charge as secondly requested, the court refused, but “charged the jury that, if they found upon the evidence that the plaintiffs employed Mead to act exclusively as a night watch upon the premises in question, and that he was a competent and proper person to be employed for that purpose, and that he did

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keep exclusively on the plaintiffs' premises, in the faithful performance of his duties as night watch, and they were ignorant of the engagement which he had made to Perrine, Patterson & Stack, then his having made the engagement with them which he testified he made, and having rendered for them only such services as he testified he rendered, would not be a non-compliance with the conditions which would preclude a recovery by the plaintiffs in this action." To this part of the charge the defendants excepted.

Mead testified that he was "never off the plaintiffs' premises one night." One of the firm of Perrine, Patterson & Stack told Mead "to keep an eye on their premises, as he was going back and forward, and he would make it all right." He "agreed to watch the premises, going backward and forward." He did not go into their yard. He could see in the yard without going off plaintiffs' premises. He could see over the fence almost all the way. He could get on barrels and look over it. It did not prevent his doing his duty to the plaintiffs. He always kept on the ground of the oil factory.

This summary of Mead's testimony, is his version of what he agreed to do, and did do, for Perrine, Patterson & Stack.

The jury have found that he was a competent night watch, that he was employed to act exclusively for the plaintiffs, that he kept exclusively on their premises, faithfully performed his duties, and that the plaintiffs were ignorant that he had agreed to occasionally look into another and adjoining yard, which could be seen from the yard of the plaintiffs.

It is contended that a warranty must be literally complied with. The warranty was that the plaintiffs, during the policy, would "keep and maintain a night watch on the premises." They did keep and maintain one there every night, who, on no occasion, left the premises. They did not agree that he should never look off of them, or on no occasion be dozing or fall asleep. The spirit of the warranty is, that there should be a competent night watch kept there, and one who might be confided in for the faithful performance of a night watch.

The rule is said to be, that "while on the one hand a literal fulfilment of the warranty is required, yet, on the other, it is no less certain, that nothing beyond a bare and literal fulfil-

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ment can be required. A warranty will not be extended, by construction, to include any thing not necessarily implied in its terms."

Thus, in *Hyde v. Bruce* (3 Doug. 218), where there was a warranty, "that the ship should have twenty guns," and it appeared that, though in fact the ship had twenty guns, yet she had only twenty-five men, a number quite short of the necessary complement for twenty guns, Lord Mansfield held, that this warranty did not imply that she should carry a competent number of men to work the guns, and, therefore, as there was no ground to impute fraud, the warranty had been sufficiently complied with. (*Bond v. Nott*, Cowp. 601; *Bean v. Stupart*, Doug. 11; 1 Arnould on Ins., § 215, p. 588.)

In *Kemble v. Rhineland* (3 J. C. 134), Kent, J., says, "A warranty must be literally complied with, but this strict compliance ought to operate in favor of, as well as against the assured, whenever he can bring himself within the terms of it." The plaintiffs literally did all they agreed to do. They kept and maintained a night watch on the premises every night, including that of the fire. He was competent, and faithfully performed his duties. The terms of the warranty do not necessarily imply an agreement, that the night watch employed should not do, what Mead did for Perrine, Patterson & Stack. We think that the objections made and exceptions taken, are not such as to justify us in disturbing the verdict.

Judgment must be entered for the plaintiffs on the verdict.

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Equity will rescind a contract for the sale of land, upon the application of the purchaser, when it clearly appears that the parties acted under a mutual mistake as to the number of acres or lots which the boundaries contained; and it is proved that the deficiency was material.

In such a case, the relief will be granted, even when the words "more or less" are added to the description of the quantity of the land in the contract.

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Even when the complaint claims relief solely upon the ground of a fraudulent representation by the vendor, the relief will be granted, if, in the answer of the defendant, the mistake is confessed.

Judgment at special term affirmed, with costs.

(Before DUZA, BOSWORTH, and EMERY, J.J.)

October 28 · December 24. 1853.

APPEAL from a judgment at special term.

The complaint alleges, that the plaintiff, on the 22d February, 1851, bargained with the defendant to buy of him a piece of ground at and near the south-east corner of Atlantic street and Clason Avenue, in Brooklyn.

That defendant, well knowing the premises to contain a much less quantity than 8 acres and 154 perches of land—viz. 4 acres and $\frac{1}{8}$ parts of an acre only, then and there falsely, and as plaintiff believes, fraudulently represented, or caused the premises to be represented, to him to be and contain 8 acres and 154 perches; falsely, and as he believes fraudulently and deceitfully, induced him to buy the said premises, and sold the said premises to him for fourteen thousand dollars.

That plaintiff paid defendant one thousand dollars, part of the purchase money.

That the premises did not contain 8 acres and 154 perches, but only 4 acres and $\frac{1}{8}$.

That defendant having so falsely and fraudulently deceived and defrauded him in the said sale, he thereby lost and was deprived of all the benefit and advantage which he might and otherwise would have derived and acquired from the said sale to him.

That, on or about 8th March, 1851, as soon as he had ascertained that the said representations were untrue, he demanded of defendant a return of the one thousand dollars, which defendant refused and still refuses. Plaintiff demands judgment for the one thousand dollars, and interest.

The answer denies that plaintiff bargained with defendant to buy the premises; also that he well knowing the premises to contain much less than 8 acres and 154 perches—viz. only 4 $\frac{1}{8}$ acres, by falsely or fraudulently representing, or causing the premises to be represented, to plaintiff to contain 8 acres and 154 perches, falsely, or fraudulently, or deceitfully induced

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plaintiff to buy the premises, or sold them to him for fourteen thousand dollars.

It avers, that shortly before the 22d February, 1851, one Herman C. Adams bargained with defendant to buy of him, for thirteen thousand dollars, the premises mentioned in complaint, particularly described in a deed made by Samuel T. Roberts and wife to defendant, dated 28th May, 1850, and therein described as containing about 9 acres more or less, excepting thereout 1 acre and 6 perches.

That defendant expressly stated to Adams that he was ignorant of the quantity of land contained in said premises, and that if he purchased them of defendant he must purchase them as defendant had purchased them, as containing more or less, and as described in said deed.

That defendant left said deed with Adams for his examination. That Adams agreed to buy the premises of defendant, as described in said deed, be the quantity greater or less, for the sum of thirteen thousand dollars.

That on or about the 22d February, 1851, Adams paid defendant one thousand dollars on account of said purchase, and requested defendant to give a receipt for that sum in the name of the plaintiff. That defendant gave such receipt in the name of plaintiff, solely at Adams' request, and also at his request mentioned the price to be paid for the land to be fourteen thousand dollars.

That he has no knowledge or information, sufficient to form a belief, what quantity of acres or perches the premises contain, and controverts the allegations in complaint as to the quantity therein stated, and denies that he falsely or fraudulently deceived or defrauded plaintiff in the sale, or that he made any representations whatever to plaintiff.

That he has always been ready to complete the bargain made by him with Adams, and in pursuance of his (Adams') request made out a deed conveying the premises to plaintiff, which deed, executed by himself and wife, he tendered to plaintiff on 10th March, 1851.

The reply controverts the new matter alleged in the answer.

It admits that defendant gave to him a receipt in his (plaintiff's) name for the one thousand dollars paid him as stated in

complaint, but denies that it was so given in his name, or that the price to be paid for the land was mentioned to be fourteen thousand dollars at the request of Adams, unless such request was made by Adams as the agent of defendant; denies all knowledge or information of any other receipt; denies that defendant has been ever ready to complete the bargain made with him (plaintiff); or that he, in pursuance of any request of plaintiff's, or made by his authority, executed or tendered any deed conveying the premises bargained for by plaintiff; or that plaintiff ever requested, or authorized any one to request defendant, to make out or execute a deed containing a less quantity than the premises were represented by defendant to contain as alleged in complaint.

The facts of the case as proved on the trial were as follows.

The premises in question were conveyed to the defendant by Samuel T. Roberts and wife, by deed dated 28th May, 1850, which was produced in evidence. They were described in that deed as "containing about 9 acres, be the same more or less, excepting therefrom 1 acre and 6 perches;" but in fact they contained only $4\frac{1}{4}$ acres, as shown by the surveyor, who also testified that property in that part of Brooklyn was only valuable for building lots.

Herman C. Adams, a real estate broker, testified that his attention was first called to this property by Mr. Kinney, and that he had been in negotiation with the defendant for the purchase of it for six or eight months previous to February, 1851, about which time defendant finally proposed to take thirteen thousand dollars for it. Adams told him he had no doubt he, Adams, could sell it, and that he knew a party who had purchased in the neighborhood. Defendant told Adams he would give him all he could get over thirteen thousand dollars, and Adams told defendant he would take it himself if he could not sell it.

Adams then went to plaintiff, mentioned the property to him, and asked him fourteen thousand dollars for it, without disclosing the name of defendant as principal. Plaintiff requested Adams to show him a diagram of the property. Adams got one from the defendant, which was produced in evidence, showed it to plaintiff, and sold him the property for

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fourteen thousand dollars. Adams was but a few days in negotiating with plaintiff before he sold him the land. Before the bargain was concluded, Adams and plaintiff went on the land together and saw it, but, he thought, they had not the diagram with them on that occasion. Defendant had given Adams his deed, and Adams thought that he showed it to plaintiff before the bargain was concluded with him; but thought he had not the deed when he and plaintiff went on the premises together. Adams did not know, and there was no evidence, that plaintiff and defendant had ever come together in relation to this purchase; nor was there any evidence that plaintiff's name was mentioned to the defendant prior to the payment of the one thousand dollars, and taking the receipt for it from defendant.

The receipt, in the defendant's handwriting, was given in evidence by the plaintiff, as follows:

"New York, February 22, 1851.

"Received from Edward Belknap, per H. C. Adams, one thousand dollars, on account of purchase of property at Brooklyn, being the same premises conveyed to me by Samuel T. Roberts, by deed dated 28th May, 1850, and which I hereby agree to convey to the said Belknap, or to his order, on the 10th day of March next, upon the payment of the further sum of thirteen thousand dollars; or six thousand dollars, and subject to a mortgage now upon the same made by me to J. & J. F. Marshall, to secure the sum of seven thousand dollars. Said deed to bear date the 1st instant.

"BENJ. T. SEALEY."

The judge having refused to dismiss the complaint on this evidence, the defendant called

Gabriel O. Kinney, who testified, that the defendant had employed him to sell the property as his broker, and that he was to receive a commission from defendant; that he had made the diagram and shown it to Adams previous to the conversation between Adams and defendant about the land; that he was present at such conversation, and Adams told defendant he

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would take the property as represented in the diagram at fourteen thousand dollars. He did not recollect whether Adams said anything about the quantity of land. That Adams in a few days afterwards called with the one thousand dollars, and witness was present when the defendant received it. Adams requested the receipt to be made to plaintiff; that he recollected a conversation which he thought was about the time Adams paid the one thousand dollars, in which Adams asked defendant what quantity of land there was, and defendant said he did not know anything more about it than what the deed to him spoke of; he represented it just as the deed represented it. Adams said he had sold it to the plaintiff.

The cause was tried before Mr. Justice Campbell without a jury, and on this evidence the judge found that the quantity of land formed an essential inducement to the plaintiff to purchase, and that the actual quantity was substantially and essentially less than the quantity which the plaintiff supposed he was purchasing; and so the plaintiff was misled as to the quantity he purchased, the representations made to him by the defendant being in fact untrue, though not intentionally false. He adjudged that the error into which the plaintiff was thus led was sufficient to warrant him in relieving him from the contract; and gave judgment for the plaintiff for the one thousand dollars paid, with interest.

W. C. Noyes, for defendant, in moving to reverse the judgment, made and argued the following points.

I. The motion to dismiss the complaint should have been granted, because—1. The complaint is for a cause of action founded solely upon fraud and misrepresentation as to the quantity of land, and charged the defendant with making the misrepresentation, knowing it to be wholly false, and with the intent to deceive him; and that thereby he was fraudulently drawn into a purchase of only about four acres, when it was represented to him, and he bargained for, upwards of eight acres, and upon this the issue was joined. 2. Not a particle of evidence was given to sustain the issue thus made; nor was it pretended to be sustained. It was simply proved, that there was not so much land as the diagram and deed were supposed

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to call for; but there was no evidence of any misrepresentation on that subject, or of any fraud whatever. 3. This action was not maintainable without proof of the fraud alleged. It was not a case in which the plaintiff might disregard the allegations in the complaint charging fraud, and still recover, as if he had not inserted them: that rule only applied to cases where the action was upon a warranty, which the plaintiff alleged to have been a fraudulent one, but yet was permitted to recover, though he failed to prove the fraud, having proved the warranty, which was alone the gist of the action (1 Chitty's Pl., Ed. of 1844, pp. 137, 388; *Williams v. Allison*, 2 East. R. 446). Here there was no warranty, nor any complaint as upon a warranty, nor, upon the facts alleged, was any action maintainable, without proof of the fraud. 4. The action was not maintainable, upon the ground that there was a mutual mistake as to the quantity of land, and that, therefore, the plaintiff was authorized to rescind the contract, and recover back that part of the purchase money which he had paid. (a) No such case was made by the complaint, nor was any such issue presented. (b) No such case was proved; none of the parties were mistaken as to the subject matter of the purchase, or as to the quantity; both saw and examined it, and knew the precise limits which the land embraced; it was simply an agreement to sell that specific parcel of land, and no more; and there was no evidence that the plaintiff was under any mistake about it; it was his duty to have had the land measured, if he wished to be certain as to the quantity, or to have protected himself by an express agreement as to there being a certain quantity. (c) The agreement for the sale of the land, covers only the premises described in the deed, whether small or great; it contains no clause guaranteeing any particular quantity; and the deed itself, by which the lands were sold, and which the plaintiff saw and examined before he purchased, describes them as "containing about nine acres, be the same more or less." (d) The case is, therefore, to be considered in the same manner as if the deed was embodied in the agreement to sell, and then there was no statement or representation other than that the premises contained an uncertain quantity of land, which the plaintiff purchased for a specified sum, and in respect

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of which any idea of a warranty of quantity was excluded. (*Winch v. Winchester*, 1 V. & B. 375; *Root v. Puff*, 3 Bar. S. C. R. 353; 1 Sug. on V. & P. 320, and notes; *Jackson v. Barringer*, 15 John. R. 471; *Jackson v. McConnell*, 19 Wend. 175.)
 (e) It is settled in cases of this description, and in the absence of all fraud, that the plaintiff is not entitled to any relief, but must take and pay for the land as described. (*Stebbins v. Eddy*, 4 Mason's R. 414; 2 Kent's Com. 484, 5; Dart on V. & P. 443; 2 Russell, 570.)

J. J. Townsend, for plaintiff.

I. Where there is a substantial defect in the estate sold, either in title or in the representation or description of the nature, character, extent, or quality, which is unknown to the vendee, or in regard to which he is not put upon inquiry, he may rescind the contract, and a specific performance will not be decreed against him. (Story Eq. Jur., § 778; 2 Kent Com. 6 Ed., p. 475; *Pringle v. Witten*, 1 Bay R. 256; *Gray v. Hankinson*, id. p. 278; *Glover v. Smith*, 1 Eq. R. 433; *Flight v. Boody*, 1 Bing. N. C. 377; *Jones v. Edney*, 3 Camp. 285; *Waring v. Hoggart*, 1 Ry. & M. 39; *Stewart v. Allison*, 1 Mer. 26; *Halsey v. Grant*, 13 Ves. 78; *Price v. North*, 2 Young & Col. 621; *Shaakleton v. Sutcliffe*, 1 De G. & S. 609.)

II. The plaintiff has used extreme diligence, and has been in no default. (See Story on Sales, 422; *Pringle v. Samuels*, 1 Little, 94; *Hill v. Buckley*, 17 Ves. 394, 401; *King v. Wilson*, 6 Beav. 124.)

III. The words "more or less" in the deed do not aid the defendant. The case does not show that the plaintiff ever saw the deed. These words are only intended to cover a reasonable defect. (*Thomas v. Perry*, 1 Peters 58; *Quesnel v. Woodlief*, 2 Hen. and Mun. 173, note; *Day v. Fenn*, Owen, 133; cited in Sug. on Ven. 370; *Portman v. Mill*, 2 Russ. ch. 570; *Shaakleton v. Sutcliffe*, 1 De G. & S. 609; *Hill v. Buckley*, 17 Ves. 400; 4 Kent 467, 6th ed.)

IV. A distinction exists between agricultural lands and lands valuable only for city lots, in reference to the materiality of the description of quantity.

D.—II.

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V. The judge who tried the cause passed upon the fact that the quantity described formed an essential inducement to the plaintiff to purchase.

By THE COURT. **EMMET, J.**—The view taken of this case by the judge before whom it was tried presents the following questions.

First, Was the contract of sale made under a mutual mistake of both plaintiff and defendant as to the actual quantity of land?

Second, Was the fact, in regard to which such mutual mistake existed, material to the contract; or, in the words of the judgment below, was the actual quantity substantially and essentially less than the quantity which the plaintiff supposed he was purchasing?

Third, Did such mutual mistake, and materiality as to the fact in regard to which it existed, warrant the court in rescinding the contract and replacing the parties as they stood before it was made?

The last inquiry necessarily involves the consideration of the first; because the fact of the defendant being mistaken as to the quantity of land can only be obtained from his own allegations in his answer, and if those allegations, taken to be true, are sufficient to establish that fact, he must be bound by them in regard to the issues involved in the case.

It is true, as urged by the defendant, that the cause of action set forth in the complaint rests exclusively upon the alleged misrepresentation and fraud of the defendant as to the quantity of land; and if the defendant had confined himself in his answer to a denial of that charge, the case would have presented the single issue, whether the plaintiff had been deceived in the purchase by the falsehood and fraud of the defendant. But the defendant, not denying the alleged discrepancy in the quantity of land, has distinctly set up his own ignorance on that subject, by disclaiming any knowledge in regard to it when the contract was made, and by averring that during the negotiation he expressly stated such ignorance to Adams, the broker. If this statement was true, and that he really had no other knowledge as to the quantity of land than what he derived from the deed

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from Roberts to him, he was clearly as much under a mistake in that respect as the plaintiff, who has derived whatever belief or supposition he may have had as to the quantity of land, from the same source. The question of the defendant's mistake was therefore distinctly presented by himself. He has no right to complain that full credit has been given to his own statement in this respect, nor ought he to object to having this conclusion drawn from his answer, because no other can fully exonerate him from the imputation of having known at the time that the premises actually contained much less land than what the plaintiff, or any one, would have been led to suppose from the Roberts deed, and of having thus committed a deliberate fraud on the plaintiff. The judge on the trial was warranted, therefore, in viewing this case as one of mutual mistake in fact, and in holding that question, as matter of law, to be one of the issues involved in it; and his decision in that respect was a vindication of the defendant's honesty and good faith in the transaction.

In considering the point of materiality, it should be observed, that this was a purchase in bulk, for a round and not inconsiderable sum, of a small piece of land, valuable only for building lots; and that the deficiency complained of amounted to nearly one-half of what might reasonably be inferred to be the quantity, from the description in the Roberts deed. That description, it is true, contains the words, "be the same more or less," in reference to the contents of the premises, but those words cannot, either on principle or authority, cover so glaring a discrepancy as this case presents. It was held, at a very early period of English jurisprudence, that the words *sive plus, sive minus*, shall be intended of a reasonable quantity, with reference to the extent of the grant (*Day v. Fynn*, Owen R. 133); and the Court of Appeals in Virginia, more than half a century ago, decided that "more or less," inserted in a deed, should be restricted to a reasonable or usual allowance for small errors in surveys, and for variations in instruments. (*Quesnel v. Woodlief*, 2 Hen. & Mum. 173, note.) Whatever latitude of discrepancy those words may have been held to embrace in particular cases, the principle, that they shall not cover more than an inconsiderable deficiency, in reference to the alleged or sup-

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posed contents, has been sanctioned by numerous authorities, and cannot now be questioned; and the rational and just rule may be invoked for the protection of vendors as well as purchasers. Equity always relieves the former where the error is flagrant. (Sugden on Vendors, ch. 6, sec. 3.) There can be no doubt of the fact, as found by the judge, that the actual quantity of land in this case was substantially and essentially less than that which the plaintiff supposed he was purchasing. The materiality of the mistake, therefore, as a requisite ground for the judgment which he rendered, was fully established.

It remains, therefore, to determine whether, fraud being the only ground upon which relief was sought by the complainant, and that ground not having been sustained, it was within the authority of the court to adjudge that the plaintiff should be relieved from the contract, and the money paid by him be refunded. If the defendant had simply denied the fraud imputed to him, and driven the plaintiff to sustain that ground by proof, and the plaintiff had failed to do so, the proper disposition of the case would have been to dismiss the complaint; but, as already shown, the defendant, instead of holding the plaintiff strictly to the issue of fraud, expanded the field of inquiry, by setting up his own ignorance, at the time of the purchase, of a discrepancy in quantity, which he could not deny, and which on its face was material, and by so doing he enlarged the area of jurisdiction, within which the merits of this case should be considered and decided upon.

With these elements of mutual mistake and materiality, and the contract being yet *in fieri*, it came strictly within the equitable powers of the court to rescind the purchase and to restore the parties to their original rights.

This view of the case is strengthened by high authority. On a bill to annul a contract for the sale of a large tract of land, and to recover back the portion of the purchase money which had been paid, on the ground that representations had been fraudulently made that the tract contained a much larger quantity of land than turned out to be true, it appearing from the answer and evidence that both parties had acted under a mistake in regard to that fact, which was held to be material, Judge Story disregarded the question of fraud as unnecessary

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and improper to be considered, and deemed it the duty of the court to decree, on the grounds of such mutual mistake and materiality, that the agreement should be rescinded and the parties reinstated in their antecedent rights and interests. (*Daniel v. Mitchell*, 1 Story R. 172.)

BOSWORTH, J.—The statement, by the judge who tried this action, of the facts found by him, is not very precise. I think an ordinary man, of common understanding, on reading it, would say the judge had found that the defendant untruly, but innocently, misrepresented the quantity sold, and that this was not only an operative, but was also an essential inducement to the contract. That the quantity was only about half of what it was represented to be, and, therefore, the plaintiff was equitably entitled to a rescission.

Assuming these to be the facts found, the judgment cannot be said to be erroneous, unless the cause of action stated in the complaint differs in its entire scope and meaning from that established by the facts found by the court (Code, §§ 171, 176), or unless there is no evidence to support the facts as found, or unless the facts found are insufficient to constitute a cause of action.

Courts of equity have so long rescinded contracts, on account of their having been induced by a mutual mistake as to material facts, I do not think it will be seriously contended that no such relief can be properly granted, for that cause. (*Champlin v. Levin*, 18 Wend. 407.)

I do not think the judgment should be reversed, merely because the evidence in support of the facts as found is slight. There was some evidence to support it. The diagram exhibited had a memorandum on it, stating that the "deed calls for 9 acres, less 1 acre and 6 perches, sold." There was less than four acres and a-half, exclusive of that which had been sold. The defendant's witness states there was conversation as to the quantity, and the "defendant represented it just as the deed represented it." The diagram neither states the length nor the course of the boundary lines.

I do not feel at liberty to hold that the facts found are so clearly contrary to evidence, that for that cause alone the judgment must be reversed.

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I do not assent to the proposition that the whole right to relief is, by the complaint, based exclusively on the ground of the intentional fraud of the defendant. The pleadings are under the Code, and their forms and sufficiency are to be determined solely by the Code itself. (§ 140.)

The complaint states that the plaintiff was induced to enter into the contract by the defendant's "falsely, and as plaintiff believes, fraudulently representing," &c.; and further charges, "that so the said defendant falsely, and, as he believes, fraudulently deceived and defrauded the plaintiff in the said sale," &c.

Here "falsely" is used in contrast with "fraudulently," and as synonymous with erroneously and untrue. The allegation of falsely deceiving is only equivalent to saying, that the plaintiff credited and acted on this material, but untrue statement, and was deceived by it.

By alleging that the defendant made this statement falsely, and, as the plaintiff believes, fraudulently, the complaint charges, first, actual misrepresentation; and, second, a belief that it was fraudulently made. The defendant denies making any representation as to the quantity, and avers that he was ignorant of the quantity. He also denies making any fraudulent misrepresentation.

There were issues therefore—first, as to whether any actual misrepresentation was made; and, second, whether, if made, it was made with an actual intention to defraud.

Proof of actual misrepresentation of matters material, and operative inducements to the contract, by which the plaintiff was misled, entitled him to rescission. Enough was proved, regarding the facts found as being proved, to make it proper to grant the relief adjudged.

It is a case, therefore, in which the allegation constituting the cause of action was unproved, "in some particular or particulars only," but not "in its entire scope and meaning" (Code, § 171), and presented neither the case of a failure of proof, nor of a variance which the judge at the trial was at liberty to regard. (Code, §§ 169, 170, 467.)

As enough was alleged, and has been established, to constitute a good cause of action, independent of the allegation of

an actual fraudulent intent, there is no ground for reversing the judgment except the solitary one, that the evidence given was insufficient to warrant the finding of an actual misrepresentation of the quantity on which the plaintiff relied, and by which he was misled. I do not understand that Mr. Justice DURE would reverse, solely on the ground that the facts established were found so clearly against evidence, that the judgment for that cause alone ought not to be permitted to stand. In this case the contract has not been consummated; no deed has been executed. The agreement is, as yet, executory. The case, therefore, does not fall within the rule which controlled the decision made in *Fowre v. Martin* (Court of Appeals, Oct., 1852). In the latter case, GRIDLEY, J., says: "It is not claimed that the original agreement was procured by fraud, misrepresentation, or mistake." A conveyance had been accepted, without any objection that it did not conform to the actual agreement and understanding of the parties. The contract had been consummated.

In the case before us, it is alleged and proved that the agreement was procured by a misrepresentation of material matters, forming an essential inducement to the contract. It is a case of mutual mistake, induced by untrue representations of the defendant. If they were not innocently made by him, he committed an actual fraud. But though made innocently, equity will not permit the defendant to hold the plaintiff to a contract which he has by such means induced him to enter into, where the thing contracted for is so essentially different from what it was represented, and, by reason of such representation, was believed to be. I think the judgment should be affirmed.

DURE, J., dissented, principally upon the ground that, in his judgment, the only issue made by the pleadings was, that of the fraud of the defendant, and that this having been found in his favor, the court had no power to grant relief upon the ground of mutual mistake.

He also expressed great doubts whether, had the complaint been properly framed, the contract, upon the evidence, could be justly rescinded. As the true boundaries had been shown to

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the plaintiff, it might very reasonably be held, that he took upon himself the risk of these boundaries containing the number of acres that it was believed they included.

Judgment affirmed, with costs.

HENRY C. BOWEN, et al., v. ZENAS NEWELL, and others

The action was against the defendant, as endorser of a check, payable at a bank in Connecticut, on a day subsequent to its date, which was presented for payment on that day, and due notice of its dishonor given to the defendant. It was proved on the trial, that it was the usage of all the banks in Connecticut not to allow days of grace upon checks on time, and that, by the laws of Connecticut, the allowance of grace is governed by usage.

Held, that evidence of the usage, and of the law, of Connecticut was properly admitted, and established, conclusively, the right of the plaintiff to recover. Judgment accordingly.

(Before DURN, CAMPBELL, and BOSWORTH, JJ.)

December 12; December 31, 1858.

This action was brought to recover of the defendants, Searls as makers, and the defendant, Newell, as endorser, the amount of the check following.

"\$2,000.

New York, Oct. 5th, 1849.

"Cashier of the Thompson Bank.—Pay Zenas Newell, or order, two thousand dollars, on the 13th instant.

(Signed,)

"BELL & SON,

(End.,)

"ZENAS NEWELL."

This cause was formerly tried in this court,* when it was decided that the check in question was not, on its face, by law, entitled to days of grace; and that, however that might be, proof of a custom of the Thompson bank, and other banks in Connecticut, to pay such checks according to their face was admissible, and controlled the parties to such check. Judge

* See the case fully reported, 3 Sand. S. C. R. 326.

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ment having been given for the plaintiffs, the Court of Appeals granted a new trial, and a majority of that court held, that the check on its face was entitled to grace; and that this being the law, and the check being, according to this rule of law, payable three days after the day named on its face—proof of a usage contrary to the law, and that it was payable according to its face, was not admissible to control the parties.

The following opinion of the Court of Appeals, was delivered by Mr. Justice Johnson:

"JOHNSON, J.—The main question in this cause is, whether an instrument in the following form is, or is not, entitled to days of grace:

" 'New York, Oct. 5th, 1849.

" 'Cashier of Thompson Bank.—Pay Zenas Newell, or order, two thousand dollars, on the 12th instant.

(Signed,)

" 'B. SEARLS & Co.

(Endorsed,)

" 'ZENAS NEWELL.'"

"The Thompson bank is in the state of Connecticut. Whether days of grace are to be allowed upon this instrument does not depend upon its being drawn upon a bank, for in that case the rule would be general, and deny grace to all bills drawn upon banks. The contrary was adjudged in respect to a bill drawn at sixty days after date, in *Woodruff v. The Merchants' Bank* (25 Wend. 673); S. C. in error (6 Hill, 174). I do not see what difference, in the legal rights of the parties, it would have made if the check in suit had been worded 'seven days after date,' instead of saying 'on the 12th instant,' and yet, if it had been those words, there would have been no possible ground for distinguishing the case from *Woodruff v. The Merchants' Bank*. No case holds to the contrary, except *In the matter of Brim* (2 Story, 502). In that case, however, Judge Story puts his opinion upon a variety of grounds besides this, and upon this, his opinion does not seem to me capable of being sustained. He says, 'The agreement pressed is, that checks are always payable on demand, and that when payable at a future time, they become inland bills;' and after saying, that

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'a check is not less a check for being post-dated,' (with which *Mohawk Bank v. Roderick* agrees, 13 Wend. 133, S. C., 14 Wend. 344,) he adds, 'it is commonly, though not always payable to the bearer; but I conceive it to be still a check if drawn on the bank or banker, although payable to a particular party only by name, or to him, or to his order. It is usually also made payable on demand, though I am not aware this is an essential requisite. The distinguishing characteristics of checks, as contra-distinguished from bills of exchange, are (as it seems to me), that they are always drawn upon a bank or banker; that they are payable immediately on presentment, without the allowance of any days of grace; and that they are never presentable for acceptance, but only for payment.' Of all these characteristics, the only one that can serve any purpose in determining whether any particular instrument is a check or a bill of exchange is, that it is drawn upon a bank or banker. The others may, or may not be legal qualities which belong to checks, after they are ascertained to be checks, but do not aid in determining their character. The citations from Kent's Com. in the same opinion, are merely to the same effect, and the case, on this branch of it, is, after all, put upon the statement that, by the usage of banks, and the understanding of parties, such instruments are always treated as payable on the very day designated as the day of payment. We have, however, seen that by the law of this state, as expounded in the Court for the Correction of Errors, that conceding any instrument to be a check, which is drawn upon a bank, it does not, therefore, possess the quality of being payable on the day when, by its face, payment is to be made, but that, unless it be payable on demand, it has days of grace.

"The usage which was proved in this case, ought to have been excluded, in accordance with *Woodruff v. The Merchants' Bank*."

"The judgment of the Superior Court and of the referee, should be reversed, and a new trial ordered, costs to abide the event."

On the first trial, there was no proof as to the laws of Connecticut, and the cause was tried and decided upon the assumption that it was the same as in this state.

On the second trial, before Mr. J. Campbell and a jury, the

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plaintiff's counsel admitted that the check was protested without allowing grace, and that according to the rule adopted by the Court of Appeals, in the absence of proof of a different rule in Connecticut, this was before it was due; but he claimed that by the law of Connecticut, where the check was payable, and which governs this case, a different rule prevails, and that by that law the check was not entitled to grace.

To prove this to be the law of Connecticut, the testimony of eminent judges and lawyers was produced, and also the adjudication of the courts of that state, and of other states, recognised there as law. Proof to the effect that a general usage is law in that state, and held to control the parties, having been given, the testimony of merchants, bankers, and men of business, as to the existence of such usage, was produced to show that by law the check was not entitled to grace. The defendant offered no proof.

The court, on the ground that the case presented questions of law only, directed a verdict for the plaintiffs for the amount claimed by the check, and six per cent. interest; the amount of the plaintiffs' claim to be increased, if the court should be of opinion that seven per cent. interest should be allowed, and to be further increased, if damages on the protest of the check are allowable.

Asa Child, on behalf of the plaintiffs, in moving for judgment on the verdict, made and argued the following points.

I. The check being drawn on a bank in Connecticut, and payable there, is governed as to its construction and import, and of course as to the question of grace, by the law of that state. (See cases collected, 4 Cow. 410.)

II. The case shows that the law of Connecticut is, that checks on time upon banks, like the one in question, are payable according to their face, without grace, and of course this check was not entitled to grace and was protested at the right time. 1. The existence of this law, as a matter of fact, was directly involved in the issue to the jury, and was conceded to be established at the trial. The plaintiffs claimed to have proved it, and requested the court to submit the question to the jury;

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and it was upon the distinct ground and so conceded, and there was no dispute as to the facts, including the fact of the existence of this law, and that the case presented questions of law only, and the facts claimed by the plaintiffs being admitted, that the verdict was, or, by law, could have been directed. The admissibility of the testimony establishing the facts is an open question, but of the facts including this fact, it must be taken as conceded that there is no question. (Code, 285.) 2. But aside from this concession, the case shows that the existence of the law of Connecticut, as claimed by the plaintiffs, was incontrovertibly established. (a) The case of *Osborn v. Smith*, decided in this court, in which, in the opinion of the late Chief Justice Jones, it was held that such checks are not entitled to grace, and that the usage as to the time of payment, furnishes the rule of law in that respect, and controls the parties, has been recognised by the Supreme Court of Errors of Connecticut, and is expressly affirmed by the judges of that court, and eminent lawyers of that state, to be the law of Connecticut. (See *Kilgore v. Buckley*, 14 Conn. 362, where in a note to that case, *Osborn v. Smith* is reported.) (b) It is the well settled law of Connecticut, that different descriptions of commercial paper are governed by different rules as to the allowance of grace, depending entirely upon the usage prevailing as to each respectively. The rule of law there is well settled, that a general usage as to the time of payment of any class of such paper is the law of that state, and controls the question of grace upon such paper, and that there is no other law but usage allowing grace on any paper. Several classes of paper entitled to grace by the law of New York, are there not entitled to grace. The usage thus settled to be the law of Connecticut, is universal, that checks like the one in suit are not entitled to grace. (c) The several cases in the Supreme Court of the United States, and other courts named in the case, in which this rule as to usage has been adopted, have been expressly recognised, and are shown by the case to be the law of Connecticut. (*Kilgore v. Buckley*, 14 Conn. 362; *Bridgeport Bank v. Dyer*, 19 Conn. 136; 9 Metcalf, 503, 504.)

III. The testimony, taken subject to exception, of reports of cases adjudicated, and cases recognised as law, by the

Supreme Court of Errors of Connecticut, and of judges and lawyers, to establish the law of that state, and upon which the law was shown to be as claimed by the plaintiffs, is free from objection. The admissibility of the testimony to prove the law is really the only question; for, if the testimony was admissible, it is conceded, in effect, that the law is established. 1. The witnesses being judges and lawyers, who had knowledge of the law, were competent to prove it. And the reports of adjudications as to the law, were competent for the same purpose. II. The subject matter of the testimony was proper, as tending to show the fact of the existence of such law. (a) It was direct to the fact of the existence of the law claimed. Such is the decision and testimony, that the rule in *Osborne v. Smith* is the law of Connecticut. (b) It shows that usage is the law, and thus directly furnishes a rule to determine what the law is; and is equally conclusive in connexion with the other proofs, as to the fact in question. (c) The testimony as to usage was properly received, in connexion with the rule of the law, as to its effect, and furnishes a link in the chain of testimony to establish the principal fact—the existence of the law. (d) The objection, that the testimony only shows a rule of evidence to prevail in Connecticut, and does not show a rule of law as to grace, different from that prevailing here; and the objection, that usage cannot control an established rule of law, are equally untenable in fact and in law. The objections are answered by the whole case.

IV. The interest should be cast at seven per cent. instead of six. There should be added, also, to the amount of the verdict the three per cent. damages prescribed by statute on the protest of bills. 1. The contract was in New York, that this check should be paid at the Thompson Bank according to its face. That contract was broken. It was not a contract to pay interest, but that the bank would pay the amount at the time named; and the law of New York controls as to the rate of interest on the breach of the contract. 2. The Supreme Court of Errors of Connecticut has adopted this rule in the case of a check drawn there on a bank in New York. (*Bridgeport Bank v. Dyer*, 19 Conn. 136.)

Charles T. Porter, for the defendant, *contra*.

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I. The question whether days of grace are to be allowed on the instrument in suit, is to be determined according to the law of the state of Connecticut. 1. The evidence as to what is the law of that state in this respect being wholly introduced by the plaintiffs, is to be taken together, and the law is to be ascertained, not from the statement of any single witness, but from all the testimony, and the statutes and decisions referred to by the witnesses, considered as a whole. 2. The general law of the state of Connecticut in relation to the allowance of days of grace on commercial paper is, except as varied by statute in respect to promissory notes under thirty-five dollars, like our own. This is presumed to be so, and it is proved by the testimony. 3 By the common law merchant, and by the law of New York, the instrument in suit is entitled to days of grace (*Chitty on Bills*, 409; 3 *Wheat.* 152; 4 *Doug.*). 4. There is no evidence in the case that this general rule of law has been varied in the state of Connecticut by statute, or by judicial decisions, or by custom or usage judicially taken notice of by the courts. It appears, on the contrary, that this general law has been recognised in that state by the legislature. The language of the statute referred to is identical with that of the English statute, 3 and 4 Anne, c. 9, which was held in *Brown v. Harraiden*, 4 T. R. 148, to have conferred days of grace upon promissory notes. (3 *Yerg.* 210; 2 *Ld. Raymond* E. 144; 9 *Wheat.* 581.) The cases referred to by the witnesses decide nothing respecting the general law, but only that evidence of usage is admissible to vary or control it. It appears from the evidence that, if such a usage exists in Connecticut as is claimed, the courts do not take notice of it unless it is specially proved; that it would be allowed to be proved in any case, and then, but not until then, to control the general rule of law, but its existence in that state appears never yet to have been proved in its courts. 5. The evidence taken together admits of no other conclusion than that, where there is no proof of a usage or custom to the contrary, the law of Connecticut allows days of grace upon instruments in the form of the one in suit. 6. The rule that the law of the place of contract shall govern, is a rule of international comity, and the "law" which it contemplates is that fixed and determinate rule of general

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application in such state or country, judicially noticed by its courts and founded in its common law or statutes, or judicial decisions, and does not at all embrace local usages existing in such country, which are taken notice of by its own courts only when specially proved.

II. The question whether evidence is admissible here to prove the existence of a local usage in the state of Connecticut, not judicially recognised by its courts, and opposed to its general law, is to be determined according to the law of our own state.

1. This is purely a question of evidence. Will the court allow evidence to be given for the purpose of contradicting a settled rule of law, or for the purpose of varying the legal construction and effect of a written instrument? 2. Questions as to the admission of evidence relate to matters of procedure; they pertain to the remedy, and are to be determined according to the law of the country where the court sits. (2 Kent's Com. 578 [464]; Story on Conflict of Laws, § 534 a; *Yates v. Thomson*, 3 Clark & Fin. 577, 580; *Kilgore v. Bulkeley*, 14 Conn. 362; Story on Conflict of Laws.) 3. The Court of Appeals passed upon this question when this cause was before it.

III. The interest was properly computed at six per cent. When the contract specifically gives interest, the law of the place where the contract is made is to govern the rate; but where interest is not stipulated in the contract, and the money is payable at a stipulated time, and there is default in the payment, the law of the place of payment regulates the rate, for the default arises there. (2 Kent, 575 [460]; *Cooper v. Waldegrave*, 2 Beavan, 282; *Peck v. Mayo*, 14 Vermont, 33; *Scofield v. Day*, 20 Johnson, 102; *Kilgore v. Bulkeley*, 14 Conn. 377.)

IV. In relation to the motion for three per cent. damages under the statute, the plaintiffs are in this dilemma: if the instrument is considered a mere check, the statute does not give them any damages; if it is held to be a bill of exchange, they are not entitled to anything.

No such claim was made on the trial.

V. The motion for judgment should be denied, and judgment ordered for the defendant.

BY THE COURT. DUEB, J.—It appears very clearly, from the

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opinion of Mr. Justice JOHNSON, with a certified copy of which we have been furnished, that our former judgment in this case was reversed by the Court of Appeals, upon the single ground, that upon the report of the referee, the case was not distinguishable from that of *Woodruff v. The Merchants' Bank*, in which the judgment of the Supreme Court was affirmed in the Court of Errors. (25 Wend. 673; 6 Hill, 172.) The learned judge expressly says, that, in accordance with that decision, the usage which was proved before the referee ought to have been excluded.

It is certain, however, that the usage which was offered to be proved in *Woodruff v. The Merchants' Bank*, being confined to the banks of this city, was strictly local; nor do we, at all, doubt that it was upon this ground that the evidence was rejected.

The character of the usage excluded the presumption that the contract of the parties was made in reference to its existence, and it is familiar law, that it is only when this presumption is raised, that the usage is binding. When a usage applicable to the contract is general, the knowledge of the parties, and their intention to adopt the usage, are inferred from the mere fact of its existence, but to bind them by a local usage, their knowledge of its existence and their intention to follow it, are not inferred, but must be established by direct or circumstantial proof. (*Gabay v. Lloyd*, 3 Bing. 793; *Palmer v. Blackburne*, 1 Bing. 61; *Kingston v. Knibbs*, 1 Camp. 505.) In *Woodruff v. The Merchants' Bank*, no such proof was given, or offered.

It seems to us a necessary conclusion, that the Court of Appeals, in referring to the decision in *Woodruff v. The Merchants' Bank* as a controlling authority, must have regarded the usage which was proved before the referee as merely local, and, in reality, confined to the bank on which the check in question was drawn. It is only on this supposition, that this decision as bearing upon the question of usage, could with any propriety be referred to at all. The referee had stated in his opinion, which was before the court, that the parties were bound by the usage of the Thompson Bank, upon which the check was drawn, and it is this opinion, as we are persuaded, that the Court of Appeals, in declaring that its own judgment was con-

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formed to that of the Supreme Court, and of the Court of Errors, in *Woodruff v. The Merchants' Bank*, meant to overrule. It is true that the usage proved before the referee was far more extensive than that upon which he rested in part his decision, but the opinion of Mr. Justice JOHNSON shows that the fact was overlooked.

The usage as now proved, upon the trial, which the Court of Appeals directed, is general, in the broadest sense of the term. It embraces all the banks of Connecticut, their dealers and customers, and its existence and prevalence are established by evidence, which has not been controverted, and seems incontrovertible. We cannot hesitate to say that the usage, as general, is conclusively proved.

The legal effect of the usage now proved has not been declared by the Court of Appeals, and we are therefore at liberty and are bound to declare it, in conformity to our own views of the existing law. And it is our deliberate and fixed opinion that the law is settled—settled by decisions far too numerous to be quoted—that the interpretation of a mercantile contract is in all cases governed and controlled by usage (4 Term R. 216), where the usage justifies the presumption that the contract was made in reference to its existence; and that this presumption always exists when the usage proved is general, definite, uniform, and notorious. In all such cases, it is the duty of judges to give that construction to the agreement of the parties, which the usage requires, however widely this construction may differ from that which, in the absence of such proof, the terms of the instrument, or the rules of law, would constrain them to adopt. Convinced that such is the law, we cannot do otherwise than hold, that in this case the evidence of usage was properly admitted; that it proves that the check in suit was not entitled to days of grace, and that, consequently, it was duly protested, and the defendant, Newell, by notice of the protest, duly charged as an endorser.

Notwithstanding the confidence, as well as ingenuity, with which the able counsel for the defendant enforced his argument, we cannot believe that the Court of Appeals intended to give its sanction to the doctrine upon which he insisted, namely, that evidence of a usage can never be admitted to vary that inter-

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pretation of a written contract, which the court would otherwise adopt, or to supersede the application of a rule of law, by which its decision would otherwise be governed. Had such been the rule, it is manifest that days of grace would never have been allowed; and were the doctrine now to be admitted, it would follow that evidence of usage must hereafter be rejected in a vast majority of the cases in which it has been hitherto received. That the Court of Appeals has given its sanction to an innovation so extensive and perilous as this, is a supposition that we are bound to reject. The attention of that high tribunal may not have been fully directed to the cases to which I refer; but that in the exercise of an arbitrary discretion it meant to condemn and overrule them, it is impossible to believe. In all the cases that I shall quote (to which a large addition might readily be made), it will be found upon examination, that the effect of the evidence of usage has been to vary, and vary materially, that which would otherwise have been deemed the legal construction of the contract. In some of the cases, the usage effects the change by adding its own terms to those of the contract; in others, by giving a different meaning to the words of the contract; and in many, by superseding a rule of law, that the court would otherwise have been bound to follow, and apply (*Scott v. Bourdillon*, 2 Bos. & Pull. 215; *Udels v. Walters*, 3 Camp, 16; *Robertson v. Clarke*, 1 Bing. 445; *Astor v. Union Ins. Co.*, 7 Cow. 202; *Mason v. Skurray*, 1 Mars. on Ins. 226.) (In this case Lord Mansfield said, "Every man who contracts under a usage, does so, as if the usage were inserted in the contract in terms.") (*Brough v. Whitmore*, 4th Term. 206; *Da Costa v. Edmonds*, 4 Camp. 142; *Ross v. Thwaite*, 1 Park on Ins. (Hildyard Ed.) 23; *Gould v. Oliver*, 2 Scott, 252; *Same v. Same*, 4 Bing. N. Ca. 134; *Coit v. Com. Ins. Co.*, 7 John. 383; *Allegre v. Mary. Ins. Co.*, Harr. & John. 408; *Turney v. Etherington*, 1 Burr. 348; *Pelly v. Roy. Ex. As. Co.*, id. 341; *Noble v. Kennoway*, Doug. 510; *Salvador v. Hopkins*, 3 Burr, 1707; *Gregory v. Christie*, 1 Park, by Hildyard, 104; *Farguharson v. Hunter*, id. 105; *Moxon v. Atkyns*, 3 Camp. 200; *Gracie v. Mar. Ins. Co.*, 8 Cranch. 75; *Coggeshall v. Amer. Ins. Co.*, 3 Wend. 283; **Long v. Allen*, 2 Park. 797, 4 Doug. 276; **Newman v. Cazalet*, Park; **Vallance v.*

Dewar, 1 Camp. 503; **Kingston v. Knibbs*, 1 Camp. 500; **Bond v. Gonzales*, Salk. R. 445; **Gordon v. Morley*, 2 Strange 1264; **Enderly v. Fletcher*, 2 Park. 646; **Ougier v. Jennings*, 1 Camp. 505; **Palmer v. Blackburne*, 1 Bing. 61; **Planch v. Fletcher*, Doug. 251; **Eyre v. The Mar. Ins. Co.*, 5 Sergt. and Watts, 116.) (The usage proved in this case was directly opposed to the construction which the same court had previously adopted, 6 Whar. 249, and Sergeant, J., said, "We are not able to distinguish this case from the numerous cases decided in which proof of a usage had been admitted to vary and control the language used in a policy, and to give a construction different from that which it would otherwise have received.") (**Stewart v. Aberdeen*, 4 Mees. and Wells, 211; **Halsey v. Brown*, 3 Day, 346; **Rennie v. Bk. of Columbia*, 9 Wheat. 482; **Lenox Bank v. Page*, 9 Mass. 158; **Jones v. Fales*, 4 Mass. 252; **Holderness v. Collinson*, 7 B. and Cres. 212; **Seaman v. Gordon*, 8 Carr. and P. 392; **Gillan v. Simpkin*, 4 Camp. 241; **Scordet v. Brodie*, 3 Camp. 253; **Mills v. Bank U. States*, 4 Wheat. 430; **Bank of Washington v. Triplett*, 1st Peters, 3; and **Chicopee Bank v. Eager*, 9 Metcalf, 583; **Buffalo Commercial Bank v. Kortright*, 22 Wend. 348; **Allen v. Merchants' Bank of N. York*, 15 Wend. 486; S. C. in Error, 22 Wend. 218.) (In this remarkable case the judges of the Superior Court, of the Supreme Court, and the Court of Errors, were all of opinion that the construction which the law would otherwise give to a contract between a bank and one of its dealers may be set aside by proof of an opposite usage.)

No rule of law, we readily admit, is better established, or rests upon more solid foundations, than that which forbids the introduction of parole evidence, to alter or vary the terms, or legal import, of an agreement in writing.

Nor is there any rule, where its scope and meaning are properly apprehended, judges should be more anxious to maintain and enforce. It is a mistake, however, to suppose (as the observations of Mr. Justice Thompson in *Rennie v. Bank of Columbia*, have clearly shown, 9 Wheat. 587) that this salutary rule is violated by the admission of the evidence of usage to control the interpretation of a mercantile contract. The evi-

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dence is introduced, not to vary, but to ascertain, the legal import of the agreement, by ascertaining the sense in which the parties meant it should be understood and carried into effect. The usage when so proved, as to justify the presumption that the contract was made in reference to its existence, becomes a part of the contract, with the same effect, as if it were inserted in terms. Had the words, "without grace," followed the order of payment in the check in suit, the legality of the protest, and, consequently, the liability of the defendant, would never have been doubted. The judgment of law upon the evidence before us, is that these important words are a part of the check, and are just as binding upon the maker, the endorser, and the bank, as if expressed upon its face. The usage inserts the words, and the law makes it our duty to give effect to the insertion.

It is this consideration, that a general and established usage is an integral part of every contract, which its terms embrace, that explains and justifies the decisions in which the evidence has prevailed to set aside a rule of law, by which the interpretation of the contract, and the rights of the parties, would otherwise have been governed. As "*modus et conventio vincunt legem*," the right of the parties by a positive stipulation to prevent the application of a rule of law, by which their rights and liabilities under their contract would otherwise be determined, is undoubted, and as a general usage is held to afford the same evidence of the intentions of the parties, as express words, it must necessarily have the same effect. A rule of law at variance with the usage is not applied, for the conclusive reason that the parties have agreed that it shall not be. And proof of the usage proves their agreement.

The consent of the parties is the origin of every usage. When the frequency of this consent has created a general and uniform usage, its expression is no longer deemed to be necessary, and then the law, from its just regard to the real intentions of the parties, knowing that the consent was meant to be given, supplies its expression.

It is not to be denied, that in a few cases judges have held the language, that a usage, however general, uniform, and notorious, inconsistent with an established rule of commercial law, is wholly void, and consequently that evidence of its existence,

in such a case, ought never to be received. It would, perhaps, not be difficult to show that this language has originated in a misconception of the grounds, and true import of the decision of the King's Bench in *Edie v. The East India Co.*, 2 Burr, 1216 (vide 1 Duer on Ins., p. 361-2, note 22). But it is deemed sufficient to say that the doctrine, which it asserts, is expressly contradicted and overruled by a series of decisions reaching back more than a century, continued to the present day, and occurring nearly in every branch of commercial law. In most of the cases which I have cited, marked with an asterisk, a rule of law, that must otherwise have controlled the decision, was set aside by a proof of an opposite usage, and in all, the admissibility of such evidence to prevent the application of a rule that would otherwise be followed, is plainly declared.

If prior adjudications are evidence of the law which we are bound to declare, those which I have stated press upon our judgment and conscience with an accumulated force, which we are unable to resist. Upon the authorities, therefore, as well as upon principle, we must hold that every rule of law, which the parties to a contract may set aside by an express stipulation, is liable to be superseded by an hostile usage, and that it is only when an express stipulation, as an illegal contract, would be void, that proof of a corresponding usage can be justly excluded.

The propositions I have stated are general ; but it seems to us there are special reasons, amounting to a special necessity, for holding that the interpretation, which judges are bound to give to an order upon a bank, depends wholly upon the evidence of usage. As a general rule, when moneys are deposited in a bank there is no express agreement between the depositor and the bank, and in the absence of such an agreement, we think it cannot be doubted, that the contract which the law implies is, that the orders for payment, the checks of the depositor upon his funds, shall be honored and paid according to the established and known custom of the bank, in its relations with other dealers. Hence proof of the usage must be admitted, in order to show the terms of the contract, a contract which, from its nature, embraces every future payment, that, upon checks in the usual form, the bank may be required to

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make. Where, therefore, the usage proves that an allowance of grace has never been claimed by the bank upon checks in the ordinary form, even when payable upon a future day, but that invariably such checks have been paid or protested on the specified day, it will be the duty of the court to say, that the parties agreed that no grace should be allowed upon the particular check in controversy, and that this agreement is binding upon all to whom knowledge of the usage may be justly imputed.

It follows from these observations, that this case is very plainly distinguishable from that of *Woodruff v. The Merchants' Bank*. The order, in that case, was not a check, in the ordinary form, which the implied contract between the drawer and the bank might reasonably have been construed to embrace. It was not a check payable at the counter of the bank upon which it was drawn, but, by its terms, required the payment to be made at a bank in this city. To create an obligation to make the payment so required, an acceptance by the bank, on which the check was drawn, was indispensable; and, as this necessity was apparent upon the face of the draft, it was, upon its face, not a check, but a bill of exchange, and, as such, subject to the rules by which bills of exchange, as distinguished from checks, are known to be governed. It is evident, from the opinion furnished to us, that the attention of the Court of Appeals could not have been directed to this important distinction. That a check in the usual form, even when payable on a future day, must be presented for acceptance, is a novel doctrine, which, we believe, has been hitherto unknown to all the banks in this state, and to all accustomed to deal with them. Post-dated checks, negotiated before they are due, it is settled, not only by usage but by express decisions, are not entitled to grace (*Mohawk Bank v. Broderick*, 10 Wend. 304; S. C. in Error, 13 Wend. 131; *Salters v. Burt*, 20 Wend. 205), and between these and checks payable on a day subsequent to that on which they are dated, bankers and merchants have, hitherto, been unable to see that there is any ground for a distinction. In each case the check, when issued, is payable on a future day. There is a difference in the form, none in the intent. In each case the expectation is, that the check will not be presented for

acceptance, but will be presented for payment, and will be paid on the day when, by its terms, payment is demandable.

It is, however, alleged, and we are not disposed to deny, that the Court of Appeals has decided that a check, payable on a day subsequent to its date, is an inland bill of exchange, which, as such, is entitled to the usual days of grace, and can only be protested, so as to charge an endorser, on the day when the grace expires. Such, undoubtedly, is the decision that we are bound to follow, but we cannot think that we are bound to understand it in the absolute, unqualified sense, which, as corresponding with the intentions of the court, the counsel for the defendant urged us to adopt. The Court of Appeals has not said, and, we hope, never meant to say, that, in reference to checks, or any other species of negotiable paper, the necessity for the allowance of grace may not be superseded by evidence of an opposite usage, when the usage is shown to be general, uniform, and notorious. Such is the usage now established, and we apprehend that it is not merely our right, but our duty, to hold that it is valid and controlling.

The identical question, it now appears, arose and was decided by this court, as we now decide it, in 1837, in the case of *Osborne v. Smith* (vide 14 Conn. 366, note), and it is with no ordinary satisfaction that we refer to the reasoning of Chief Justice Jones, in the elaborate opinion by which he there sustained the judgment of the court, as corresponding in all respects with the views that, previous to our knowledge of his opinion, we had been led to entertain.

So far, the case has been considered by us, as governed by the law of this state; and, even upon this hypothesis, we have found it necessary to hold that this plaintiff is entitled to recover—but, in reality, it is not upon the law of this state that the right of the plaintiff to the judgment which he seeks, and we are prepared to render, at all depends. The check in suit was drawn upon a bank in Connecticut, and was there payable, and, consequently, it is by the law of that state that the question, whether it was duly protested, and the defendant duly charged as an endorser, must alone be determined. Hence the counsel for the plaintiff, with commendable prudence, in order to rescue the case from the possible hazard of a wider

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interpretation being given to the reversal of our former judgment by the Court of Appeals, than we have found it necessary to adopt, has given evidence of the law of Connecticut, in its bearing upon the question we are requested to decide, as a foreign law ; and the admissibility and sufficiency of the proof so given, are the questions that remain to be considered.

It was admitted on the trial that there were no questions of fact necessary to be submitted to the jury. The question, therefore, for our determination is, whether the uncontradicted evidence on the part of the plaintiff was sufficient in law to entitle him to a verdict ; and if this must be decided in the affirmative, the fact that the law of Connecticut is such as was alleged, must be considered as found by the jury. Similar remarks apply to the evidence in relation to the usage. If admissible at all, it was conclusive, and the usage is established.

Witnesses more competent and trustworthy than those who were examined to prove the law of Connecticut, could not possibly have been selected. Their thorough knowledge of the subject in relation to which they are called to testify ; the high judicial station which several of them occupy ; the professional eminence and long experience of all, clothe their words with a peculiar and commanding authority. There is no uncertainty or variance in their testimony, and they are fully sustained in every position, which they state, by the decisions to which they refer. These witnesses have proved that, by the law of Connecticut, the question whether any particular description of negotiable paper is or is not entitled to days of grace, depends wholly upon usage, and that if a general usage exists, denying an allowance of grace to checks payable on a future day, that usage constitutes the law, which their courts are bound to follow. As the existence of this usage is established by the other witnesses who were examined, the proof seems to be complete, that by the law of Connecticut payment of the check in suit was properly demanded on the day on which it was protested, and, consequently, that the protest was regular, and the defendant duly charged as an endorser.

What, then, are the grounds of the call that has been made upon us to reject the entire body of the evidence given on the

trial? Why is it that we are required to say, that, imposing as it seems, it is wholly insufficient in law to maintain the action, and warrant a recovery?

It is possible that we have not fully comprehended the subtle reasoning of the ingenious counsel for the defendant; but I shall proceed to state, as plainly as I can, the several objections upon which we all understood him to rely.

It has not been shown, it was said, that the validity of the particular usage in relation to checks on time, has been settled in Connecticut by any express adjudication; and, in defect of this proof, it was contended that we have no right to say that the usage, although proved to exist, is established as law.

Such is not our view of our rights and our duty. In our judgment, the evidence which the objection requires, was not at all necessary to be given; nor does its absence justify a reasonable doubt as to the sufficiency of the proof that has been given. That the courts in Connecticut, upon such proof of the usage as is now before us, would be bound to declare that the usage is the law of the state, is conclusively proved; and hence, the fact that no such decision has hitherto been made, is regarded by us, as wholly immaterial. It is probable, that the exact question has not been brought before the courts, precisely for the reason that the particular usage in relation to checks is so general, uniform, and notorious, that no one has hitherto ventured to dispute its validity; nor is it probable, for the same reason, that the question will ever be litigated. Had this suit been brought in Connecticut, the evidence before us justifies the belief that no respectable counsel would have been found to advise its defence.

But, in truth, although the exact question has not been formally, it has been virtually decided by the Supreme Court of Connecticut. It was so decided by the emphatic approval which was given by that court (*Kilgore v. Bulkley*, 14 Conn. R., p. 362) to the opinion of Ch. J. JONES, in *Osborne v. Smith*. It was decided by making the judgment of this court upon the identical question, in a measure the basis of its own. The Supreme Court of Connecticut has judicially declared, that if the usage in that state is similar to that which was proved, in *Osborne v. Smith*, to be the usage of the banks in this city, the rule, which

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the usage prescribes, the law of the state ratifies and adopts. The usage, therefore, now established, establishes the law.

It has, however, been contended, and this is the last objection we shall notice, that the usage in question has not been established by any evidence that could be legally admitted; and that without this proof the evidence in relation to the law of Connecticut is deprived of its necessary support, and, as merely hypothetical, ought to be rejected. The admission of evidence, it is argued, is, in all cases, regulated entirely by the law of the tribunal in which it is offered; and, as the Court of Appeals has decided that the usage, as proved before the referee, ought to have been excluded, it is our plain duty, bound by that decision, to exclude the evidence in relation to that usage that has now been given.

To this reasoning there is a brief, and, we think, a satisfactory reply.

We have already shown that the Court of Appeals has not decided that proof of a general usage ought to be excluded, but admitting that such is the import of its decision, it must be borne in mind, that, in the case before that court, there was no question as to the law of Connecticut, which was then assumed to be the same as our own, and that the sole ground of its decision, was, that a usage, contradicting a settled rule of law, is wholly void, and its existence, therefore, not a subject of proof. It is manifest, however, that this reason has no application, where the controversy turns wholly upon a foreign law, which holds that a general and established usage, however inconsistent with the rules of the common law, has a paramount and controlling authority, and, when proved, constitutes itself the law that judges are bound to follow. In such a case, to prove the usage is to prove the law, and to exclude the evidence is in effect to determine that in our courts a foreign law, depending upon usage, cannot be proved at all. It would be a mockery to say that the law of Connecticut governs this case, and yet exclude the appropriate and necessary proof of its existence, and in this legal solecism we must refuse to be involved.

Finally, it cannot be doubted that, we are bound to decide this cause as it has been clearly proved it would now be decided in Connecticut. Three of the present judges of its highest

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court have been examined as witnesses, and the necessary result of their testimony is, that were this case now before the tribunal to which they belong, its judgment would be certainly and promptly rendered in favor of the plaintiff.

Such, therefore, must be our judgment.

Our opinion upon the other questions that were discussed upon the argument, is in favor of the defendant. We think that the claim for damages cannot be sustained, and that the rate of interest is governed by the law of Connecticut.

The verdict was, therefore, rendered for the proper amount, and there must be judgment upon it, as it stands.

BOSWORTH, J.—When this cause was before me as referee, it was satisfactorily proved, that it was not only the uniform usage of the Thompson Bank, but of all the banks in the state of Connecticut, to pay checks of the form of the one in question, on the day designated on its face for payment; or, if there were no funds to meet it, to protest it on that day for non-payment. I intended to report that I so found the facts, and not merely to find and report that such was the usage of the Thompson Bank. I have not seen the report since it was made, and am not aware whether it is open to the construction that it reports the usage of one bank only. The proof made was of a usage co-extensive with the state of Connecticut. In admitting proof of it, and in passing upon it when satisfactorily established, I disposed of the case, on the assumption, that a general, uniform, and notorious usage, in respect to an instrument like this, one in daily use, and daily acted upon, and one by which daily transactions involving large pecuniary amounts were adjusted, might properly be proved; and when proved the judgment of law was, that the instrument was made, delivered, and accepted, with reference to such usage, and that the rights and liabilities of the parties were affected by it, precisely as they would have been by the use of words in the instrument itself, stipulating in terms corresponding with the legal effect of the usage. If the special report made by the referee is correctly stated in the report of the case when first before this court (5 Sand. S. C. R. 327), it found that the usage allowed and decided to have been proved, was not merely a usage of the

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Thompson Bank, but a usage of every bank in the state, and therefore a usage applicable to every instrument of like form drawn upon a Connecticut bank, if proof of the usage was admissible.

It did not seem possible to me, that, contrary to this uniform usage, any one could suppose that such a paper was, in the intention or contemplation of any party to it, to be presented for acceptance, and if not accepted, to be protested for non-acceptance.

A drawee of a bill is not liable to pay unless he accepts it. But is it clear, that when a bank depositor draws his check on the bank with which he keeps an account, and against funds actually on deposit, a *bona fide* holder of the check could not compel the bank to pay? In the absence of any express agreement between the bank and its customer, to pay the checks of the latter, drawn on funds deposited, on the presentment of the check, or on the day on which payment was directed by the check to be made, or to pay them at all, would the court exclude proof of the uniform and notorious usage of every bank in the state, to pay to the holder on presentment of the check on the day named for payment, and deny a recovery, notwithstanding proof of such usage, and that the drawer of such check had funds in bank to meet it?

It also seemed to me, that this case was clearly distinguishable from that of *Woodruff v. The Merchants' Bank*, 25 Wend. 673. In the latter case, the bill was drawn in Michigan, on a bank in the same state, and was payable sixty days after its date in the city of New York. It had been accepted. In the absence of any facts, except the drawing of the bill and delivery of it to the payee, the drawee would be under no obligation, without having accepted it, to pay the amount in New York, or at all. It was not shown to have been drawn by a depositor on a bank in which he kept his account, nor was it payable at the counter of the bank on which it was drawn. There was no proof of an unvarying usage of the bank on which it was drawn, and of every other bank in the State of Michigan, to pay bills in that form on the precise day named, without grace.

And the only usage proved, was one prevailing in the city of New York. This local usage, if proved, the court held to be

in conflict with the settled and acknowledged law of the state. No usage throughout the state was proved or offered to be proved; nor was any usage of the state in which the parties to the bill resided proved, or attempted to be. No usage was proved of which the parties to the bill could be presumed to have notice, and with reference to which they could be presumed to have contracted.

In the case before us, a general usage of every bank in Connecticut, including that on which it was drawn; a usage of the state in which the drawee resided, and in which payment was to be made, was proved. The instrument in question was drawn by a bank depositor on his depositary, and was to be paid at the counter of the latter. I therefore thought the cases clearly distinguishable.

But the Court of Appeals I understand to have decided otherwise. If such is its decision, it follows, that they must be deemed to be, and treated as, not distinguishable; that proof of the usage was improperly admitted; that by the settled law of this state, the instrument in question is a bill of exchange, and entitled to grace, although always dealt with and acted upon as not being entitled to it; and that the same consequences will result from *laches* in presenting it for acceptance, and the same rights and liabilities result from a protest of it for non-acceptance, as in the case of an undoubted bill of exchange.

This result must follow in the absence of proof that the law of Connecticut, where the contract was to be executed, is different from that of this state. On the former trial it was not shown what the law of that state, on this subject, is.

It is now clearly proved, that a uniform and notorious usage of the state, in reference to such paper, is the law of the state on that subject.

It is clearly proved, that the usage to present and pay such paper, on the day specified, if the drawer has funds to meet it, or to protest it for non-payment, if he has no funds, is general throughout that state. That every bank in the state invariably acts upon it. Not an exceptional case is stated. The usage has existed long enough to give it the force of law, so far as the period of its duration affects the question of its validity. It is proved by testimony entirely satisfactory, so far as the number

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of witnesses, their means of knowledge, and their capacity to speak authoritatively, are concerned. I concur in the judgment now given, on the grounds, that the law of the state of Connecticut is the law of the contract, and that by the law of that state the instrument was not entitled to days of grace, but was payable on the day named on its face, and was therefore properly protested.

Judgment for plaintiff, with costs.

CASES OF PRACTICE
AND
DECISIONS IN SPECIAL PROCEEDINGS
AT THE
GENERAL AND SPECIAL TERMS
AND AT CHAMBERS.(a)

MILVEHAL v. MILWARD.

To prevent a failure of justice, the court will order a bill of exceptions, when a case containing the exceptions has been properly settled, to be signed by the clerk, in the name of a deceased judge, who had tried the cause.
(General Term, April, 1853.)

SUCH an order was made by the court in the above cause, with the assent of all the judges. Upon the bill of exceptions so signed, the cause has since been heard in the Court of Appeals, and the judgment of this court affirmed.

MURRAY v. GENERAL MUTUAL INSURANCE COMPANY.

When a plaintiff transfers his interest after the commencement of the suit, it rests entirely in the discretion of the court, whether the assignee shall be substituted as plaintiff, under § 121 of the Code.

(a) The cases of practice reported were decided with the sanction of two at least, and nearly all, with that of three or more, of the justices of the court.

Day v. The United States Car Spring Co.

No such order of substitution will be made, unless special circumstances are shown to satisfy the court of its propriety or necessity; and, in all cases, it will be made a condition, that the original plaintiff, the assignor, shall not be examined as a witness on behalf of the assignee.

(April 28, 1853.)

THESE points were so ruled by Mr. Justice DUKE, at special term, after consultation with all the judges, and with their concurrence.

HORACE H. DAY v. UNITED STATES' CAR SPRING COMPANY.

The Superior Court has no jurisdiction to appoint a receiver of the property or effects of a foreign corporation, for the purpose of winding up its affairs.

(April, 1853.)

MOTION for an injunction and a receiver.

It appeared by the complaint, that the defendants were a corporation created by the laws of Connecticut, and the relief prayed for was a perpetual injunction, restraining the company and its officers from making any disposition of its property, and the appointment of a receiver, with power, under the direction of the court, to collect its debts, including unpaid subscriptions, to pay all demands against the company, and distribute the surplus, if any, *pro rata*, amongst its shareholders. The judges consulted by Mr. Justice Bosworth, all agreed with him in the opinion, that the court would exceed its jurisdiction in attempting to grant the relief demanded, and, consequently, that it was his duty to deny the motion. It was denied accordingly.

Thurman v. Stevens.

THURMAN v. STEVENS and another.

When the action is founded upon an agreement, which would be void under the Statute of Frauds, unless in writing, and signed by the party to be charged, these facts, as constituting in part the cause of action, must be averred in the complaint.

(April Special Term, 1853.)

DEMURREE to complaint. The pleadings are fully stated in the opinion of the court.

EMMETT, J.—This is an action by the assignee of a judgment against the sureties of the judgment debtor, on an appeal to the general term of this court. The facts are as follows.

John Snyder recovered a judgment against James R. Del Vecchio for \$503.95. Del Vecchio appealed to the general term, and, on such appeal, Dean & Stevens, the defendants in this case, executed an undertaking, as required by the Code (§§ 334, 335, 345).

Snyder's judgment against Del Vecchio was affirmed at the general term, and an additional judgment for \$61.28, costs on the appeal, was entered. Del Vecchio paid Snyder \$210.22, on account, and Snyder then assigned the judgments to Thurman, the plaintiff in this case.

No execution was issued on the judgments; but Thurman commenced this action against the sureties on the undertaking, to recover \$363.83, the balance due by Del Vecchio, on both judgments, for principal and interest.

The complaint alleges that Stevens and Dean, in consideration of the appeal, and that Del Vecchio had a stay of proceedings upon the judgment, undertook that Del Vecchio would pay all costs and damages, &c. (in the language of the undertaking), which should be awarded against him on the appeal. It does not aver either that the undertaking was in writing and subscribed by the defendants, or that it was made or entered into with the plaintiff, or that Snyder had any right to assign, or that he did assign it to the plaintiff.

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The defendant, Stevens, demurred to the complaint on the following grounds.

1. That the undertaking set forth in it was a collateral undertaking, to answer for the debt or default of another, and was void by the Statute of Frauds (2 R. S. 135).

2. That the complaint shows no right of action in the plaintiff against the defendant.

3. That the complaint does not contain sufficient facts to constitute a cause of action.

Previous to the Code, the first ground of demurrer would clearly not have been tenable. The rule was well settled in courts of law, that the Statute of Frauds did not affect the form of pleading. If a declaration averred such an agreement, it was not necessary to allege that it was in writing, as that fact would be presumed, until the contrary appeared; and a demurrer was proper only when it distinctly appeared on the face of the declaration, that the agreement was not in writing (1 Cowen, 45; 4 Johns. 237; 6 Hill, 53; 4 B. & A. 274), and the same rule prevailed in Courts of Equity (2 Paige, 177).

The Code, however, has prescribed a new system of pleading, the fundamental rule of which, as to the complaint, is, that it shall contain a plain and concise statement of the facts constituting the cause of action. In order to constitute a cause of action against a party for the debt or default of another, the law makes it an essential fact, that he should have undertaken to do so by writing, subscribed by himself.

The making or existence of such a writing, so subscribed, is, therefore, one of the facts constituting the cause of action, and it would seem necessarily to follow, that it must be stated in the complaint.

The Code means, undoubtedly, that the complaint shall contain a perfect and clear statement of all the facts essential to the right of action; and it can hardly be said that a statement, omitting a fact so important as this, to the right of action on a collateral promise or undertaking to pay the debt of another, and which, under the old system of pleading, required a presumption of law to sustain it, can be such a perfect and clear statement.

The fact undoubtedly is, that the undertaking in this case

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was in writing, and signed by the defendants ; and if that fact had been stated in the complaint, there would have been no pretext for this ground of demurrer. The demurrer assumes that it was not in writing, contrary to the fact, because the fact was not averred, and an equivocal view of the undertaking, which is the basis of the action, is thus presented. This would have been obviated by such a statement of the facts as the Code requires. It is no answer to this to say, that, as it was on an appeal, it must have been in writing, and subscribed by the sureties, because the Code so requires all undertakings to be in such cases. The technical term "undertaking," as used in the Code, is not to be found in the complaint at all, nor is it even averred that the defendants undertook, as required or directed by law in such cases. There is nothing in the complaint which absolutely excludes the supposition, that the defendants may have undertaken, as therein alleged, by a mere verbal promise or agreement.

For these reasons, I think the demurrer upon the first ground is well taken, and that judgment must be for the defendants. But, as this ground of demurrer is upheld upon a view of the rule of pleading under the Code, at variance with an old settled principle, which the plaintiff might well consider himself bound to follow, he must be allowed to amend his complaint, without costs.

This decision renders it unnecessary to discuss the other two grounds of demurrer. I confine myself therefore to saying, that, in my view, neither of them can be sustained, except for the same reason which makes the first ground of demurrer sufficient.

DUER, J., concurred.

OGDEN v. BODLE & TAGGARD.

In an action on promissory notes, given for work and labor done, and materials furnished by the plaintiff, in building, altering, and repairing certain buildings belonging to the defendant, it is a good defence, that the plaintiff, before he

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commenced the action, had commenced proceedings in the Common Pleas, to enforce his lien upon the buildings for the same debt. Such a proceeding is an action, substantially, for the same cause, with the additional remedy that, if the debt is established, the lien will be enforced. (At Special Term, April 30th, 1852.)

BOSWORTH, J.—The plaintiff moves to strike out the answer of Bodle as being a sham answer; and for such relief as to the court may seem proper.

The complaint is on four promissory notes made by Bodle in the defendants' partnership name of Taggard & Bodle, dated August 7, 1852; one at 3 months, for \$571.49, one at 4 months, for \$577.79, one at 5 months, for \$584.39, and one at 6 months, for \$584.39.

Bodle's answer states, that the notes were given in settlement of, and solely for work and labor done, and materials furnished by plaintiff in building, altering, and repairing the buildings 2, 4, 6, and 8, Warren street, known as the Mercantile Hotel.

That after the notes were given, and before this action was commenced, the plaintiff commenced an action in the New York Common Pleas, which is still pending and undetermined, and which was brought to enforce payment from this defendant for said work, labor, and materials, furnished by the plaintiff; that the action in the Common Pleas and this action are brought for the same cause.

The affidavit of plaintiff's attorney states, that the alleged action in the common pleas is a proceeding under the lien law of July 11, 1851, to enforce a lien on the interest of Bodle only, in the Mercantile Hotel, founded upon a notice of such lien filed in the county clerk's office July 26, 1852, and for no other purpose; that no other purpose is expressed in said proceedings; that Bodle has appeared in said proceedings and put in an answer denying that he is indebted for said work, labor, and materials. It avers, on information and belief, that Bodle is insolvent.

Bodle's opposing affidavit states, that at the time the notice of the lien was filed, his interest in the Mercantile Hotel exceeded \$9000; denies that he is insolvent; and avers that his answer in the Common Pleas did not deny he was indebted to the plaintiffs, but put in issue the fact of being indebted to the amount claimed.

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The plaintiff insists, that the proceeding in the Common Pleas is not an action for the same cause as that commenced in this court; that the latter is brought to recover a judgment *in personam*, and the former to enforce a lien, or security, for the payment of the consideration of the notes in question.

The prayer of the complaint in the Common Pleas is for a "judgment that said liens may be established and enforced against said buildings for said sum of \$2,200, the interest thereon, and for costs."

The 8th section of the lien law provides, that "on the appearance of both parties, pursuant to the act, issue shall be joined, &c., and the same may be noticed for trial and put on the calendar by either party, and shall be governed, tried, and the judgment thereon enforced, in all respects, in the same manner as upon issues joined and judgments rendered in all other civil actions for the recovery of moneys in said court."

The question is, why, in the case of a proceeding directly between the original contractor and owner, and between them only, a judgment may not, and should not be entered, if the proof authorizes it, adjudging the whole amount claimed to be due; that it is a lien on the defendant's interest in the property; that such interest be sold to satisfy the debt and costs, and if a deficiency arise, that execution issue to collect such deficiency of the owner's personal and real property.

If such a judgment may be entered, then are not both suits for the same cause of action? In the action to enforce the lien, all the relief can be given which can be had in the other, and besides that, the lien can be enforced.

They are as essentially for the same cause, as an action on a bond secured by a mortgage, and an action to foreclose such mortgage, are for the same cause.

The cause of action in each case is the same, viz. the alleged debt. That must be established in the proceedings to enforce the lien, and by the same evidence that would be required to maintain an action for the work, labor, and materials.

On establishing the debt, and the facts averred to create the lien, the debt will be adjudged to be due, the lien established, and judgment given that the lien be enforced and the debt paid. The judgment will be as efficient to reach and appropri-

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ate any property of the debtor, to pay any part of the debt which the subject of the lien may be insufficient to satisfy, as a judgment on the notes would be to reach such property, to satisfy its amount.

I infer that Taggard was not served with the summons in the action in this court.

The complaint alleges, that defendants were partners, and that they, by the said Bodle, made the notes described in it.

The lien proceedings imply, that they were given for the individual debt of Bodle, and therefore Taggard would not be liable, unless he assented to the making and delivery of the notes. Such assent is not averred.

If Taggard is not liable, both suits are in substance between the plaintiff and Bodle only.

Both are brought to enforce payment of the same debt. In the one in the Common Pleas, the plaintiff can obtain all the relief that can be given by this court in the action in which this motion is made, and in addition to that can have the alleged lien enforced, if established.

The effect of allowing both suits to proceed, is to subject the defendant to two bills of costs, if unsuccessful. (9 Paige, 294.)

It seems to me that both actions are, substantially, for the same cause, and that no remedy can be obtained in this, that may not be had in the one first brought and now pending in the Common Pleas.

The plaintiff's motion is therefore denied.

Approved on consultation.

TALLMADGE and others v. THE EAST RIVER BANK.

The owners of the lots on the north side of St. Mark's Place, in the city of New York, agreed by parole that the houses to be erected thereon should be set back 8 feet from the line of the street, so as to have a court-yard of that depth and of the width of the lot in front of each house. The agreement was carried into effect by the erection of a row of dwelling-houses on a line with each other and having each a court-yard in front.

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Held, that the agreement thus executed became binding on the parties and their grantees, so as to render it the duty of a Court of Equity to restrain its violation.

Held, that each house thus erected became a servient tenement with respect to the others, to the extent of the space in front, and to that extent each acquired an easement, that unless by the consent of all the owners could not be disturbed.

Held, that an injunction restraining the defendants, who by mesne conveyances had become the owners of one of the lots, from building on the space so agreed to be left open, was properly granted.

(Special Term. Before CAMPBELL, J.)

May 21, 1868.

THIS was a motion, on the part of the defendants, to dissolve an injunction restraining them from proceeding to build on a certain part of a lot belonging to them, on the corner of the 3rd Avenue and St. Mark's Place. The facts are fully stated in the opinion of the judge.

H. Maxwell, for plaintiffs.

S. Jones, for defendants.

CAMPBELL, J.—An injunction order was granted on the complaint of the plaintiffs, alleging that the East River Bank had purchased certain premises on the north-east corner of 3d Avenue and St. Mark's Place, in this city, and were about tearing down the present building for the purpose of erecting a banking house, which should extend to the northerly line of Eighth street, or St. Mark's Place, as originally laid out on the commissioners' map, and that such building when erected would project or extend eight feet beyond the houses of the plaintiffs and others, owners of property on Eighth street, or St. Mark's Place, between the 3d and 2d Avenues; and they further charge, that more than twenty years ago, Thomas E. Davis, then being the owner of the property on both sides of St. Mark's Place, and being desirous of selling the same, or portions, and erecting, or causing to be erected, houses thereon, and to sell the same, agreed and stipulated that the north line of said street should virtually be extended eight feet farther north; that all the houses should be built upon such new line, reserving the intervening space between said line and the north line of the

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street, as originally laid out, as a court-yard; and further, in pursuance of said agreement, and in conformity thereto, all the houses were placed back eight feet, including the one in question, and that this was done nearly or quite twenty years ago. The complaint further states, that the houses on this street are large and expensive, and the value of property on the street and its locality much increased by reason of these open court-yards, and this virtual increase in the width of the street; and they insist, that the space of eight feet was set apart and dedicated to the use of the public, and cannot be reclaimed. The defendants in their affidavits say that they do not believe any such agreement or stipulation was made by Mr. Davis, and they urge as a reason, that before the time of the alleged making of the agreement, he conveyed the property in question to one Mr. Henriques, and that by such conveyance the south boundary of the premises was the northerly line of Eighth street, as laid down, and not the new line sought to be established, eight feet to the north of such original north line of the street. They further show, that the premises, after the erection of the present buildings thereon, or about that time, were mortgaged by the then owner to the Jackson Marine Insurance Company, and that in and by such mortgage the southerly line of the property was described as the north line of the street, as laid down; and further, that on a foreclosure of such mortgage the master's deed conveyed to the said Insurance Company the premises as described in the mortgage; that the Insurance Company conveyed to the grantor of the defendants by the same boundary, and that such grantor by the same boundary conveyed to the defendants; and that throughout, in all the chain of conveyances, for more than twenty years the uniform description of the premises bounded them on the southerly side by the northerly line of the street. The defendants fix 1834 as the period when the mortgage was executed to the Insurance Company, and under which the company afterwards obtained title; and the defendants state, that at this time, 1834, no buildings had been erected on the premises. In 1837 the Insurance Company obtained by a sale under a foreclosure the fee of the property, and in 1844 they sold the premises to Caleb O. Halsted, the defendant's grantor. In the conveyance to Halsted there is the

following clause : "The premises hereby conveyed, including a certain court-yard of about 8 feet in width, laid off along the southerly side thereof." The complaint charges, that the deed from Mr. Halsted to the defendants contained a clause making the grant to the said defendants "subject to all existing restrictions and covenants in relation to keeping the said space or court-yard perpetually open as such court-yard or street."

It is denied by the defendants that there is such a clause. The deed was used on the argument, and the clause in question, as contained in the deed, I do not find in the papers before me, but it was, as I understood, in substance, that the grant was subject to such covenants or restrictions, if any existed.

It does not seem to me to be very material, whether the claim was as contended for by the plaintiffs, or as set forth in the deed. The important question is, whether there was an original agreement, and if so, what was it? As a matter of fact, I entertain no doubt on the subject. So far as the proof is before me, it is not full and complete ; and, yet the circumstances actually existing are of a marked, and, it seems to me, an unanswerable character. A new street was improved ; elegant and expensive houses were erected, extending from avenue to avenue (except the premises in question), all set back eight feet, and all using that space for a court-yard. Mr. Davis was the owner and builder of these houses ; he was the former owner of the premises in question. The premises in question, when improved, were made to conform to the plan of all the other houses. When the first deed thereafter is given, that is, after the erection of the buildings, mention is made of the court-yard, as being a part of the premises included in the conveyance. The mortgage to the Insurance Company, and which was probably given before the erection of the building, contained no reference to a court-yard, as then none existed. The master's deed, of course, followed the description in the mortgage. When, however, the Insurance Company convey, mention is made of this court-yard. Special notice is made that the boundaries include this court-yard. It is, I apprehend, the same mode which would be adopted in any other conveyance of premises in St. Mark's Place. The property would be conveyed as located on the original north line of the street,

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and the conveyance would include the court-yard in front. The owner may also own this court-yard in fee, subject, however, to one certain servitude—subject to the right of his neighbor to insist that he shall use it for no other purpose.

Recurring again to the complaint, and to the affidavit on which the motion is made to dissolve the injunction,—the complaint alleges expressly, that there was no agreement that all the buildings should be set back eight feet. The affidavit says that the defendants do not believe that such agreement was made. My own opinion is, from the facts and circumstances set forth in the complaint and affidavits, that such an agreement was made, and that it is binding on the defendants. It may have been by parol, but it was executed—carried into effect by the erection of the buildings eight feet back on the whole block. It is not the case of *Wolf v. Frost* (4 Sand. Ch. R. 72), when such an agreement, unexecuted, was sought to be enforced. It is one thing to enforce such an agreement when made by parol; it is another, to attempt to violate it after it has been executed. Intent may always enter largely into questions of dedication, and where the intent is manifested by an agreement executed, the time becomes, comparatively, immaterial. In respect to all these houses and lots on St. Mark's Place, it seems to me that they must be considered each with respect to the others as a servient tenement, to the extent of the space in front, denominated a court-yard. It is a species of easement, which each owner enjoys in the property of his neighbor.

The motion to dissolve the injunction must be denied, with ten dollars costs, and an order may be entered, continuing the injunction until the hearing of the cause.

Affirmed, on appeal, at general term.

C. C. LEIGH & others v. J. WESTERVELT, Mayor, &c., & others.

No court of justice can restrain commissioners of excise from granting licenses in the exercise of the discretion given to them by the statute, when no excess of authority, or actual corruption, is averred in the complaint.

(Special Term, May 28, 1853.)

Leigh v. Westervelt.

MOTION for an injunction, before Mr. Justice BOSWORTH. All the material facts are set forth in his opinion.

BOSWORTH, J.—This action is brought to obtain an injunction, restraining the defendants—being a board of excise for the ninth ward—from in any way or manner “authorizing any person or persons whomsoever, to sell strong or spirituous liquors to be drunk on their premises, or to retail strong and spirituous liquors, and especially restraining and enjoining them from granting to any person or persons whomsoever, any license to keep an inn or tavern, public ordinary, or victualling-house, and to retail therein strong or spirituous liquors, until the further order of the court.”

On complaint, duly verified, the plaintiffs now move for such an injunction.

The complaint states, that the plaintiffs are citizens of the state, and residents and taxpayers in the ninth ward of the city, and are four of the corporators of the city. That they own real or personal estate, or both, in the city, liable to taxation, and for several years have paid taxes thereon. It states the recent heavy increase in the aggregate annual amount of the city taxes; that crime and pauperism have alarmingly increased in that ward, and that, as they believe, these evils have been caused, to a great extent, by the licensing of the sale of intoxicating liquors in that ward.

That as they are informed and believe, the defendants have procured printed licenses, which they are about to grant to sundry persons in that ward, authorizing them to keep an inn or tavern, public ordinary, or victualling-house, and also to retail and sell spirituous liquors in less or greater quantities than five gallons; and that such licenses are in direct violation of law; that they are about to grant such licenses to unfit and improper persons, and who are not of good moral character, and who, while holding such licenses, repeatedly violated their provisions during the past year.

That under color and authority of the licenses heretofore granted, the sale and use of intoxicating drinks has become so excessive, that, as an immediate consequence, \$1,000,000 has been annually added to the city taxes; twenty thousand men

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and women have been annually sent to the city prisons; many murders and homicides, and many more violent deaths have been produced.

That the granting of such licenses in the ninth ward, to the said unfit, improper, and immoral persons, will diminish the security to the life and property of the plaintiffs, and the other inhabitants of said ward and city, and will increase the burden of taxation of the said plaintiffs, and the other tax-payers of said ward and said city.

And that the granting of any license to any person to sell strong and spirituous liquors within that ward or the city, will give color and formality of law to a nuisance, and an evil corrupting and dangerous to individuals and to society; diminishing the value of property and the security of life, and directly producing the evils against which the said acts of the legislature were intended to guard.

The first question to be considered is,—has this or any other court the power to grant such an injunction as is sought, even if the facts stated in the complaint are true, and the consequences apprehended are likely to result from them? If the court has no jurisdiction to restrain the defendants from acting as commissioners of excise, and granting licenses, the motion must necessarily be denied. No case has been cited which affirms the existence of such a jurisdiction.

The statute gives "power and authority" to the defendants to grant licenses, to such persons as they shall deem fit and proper, to retail strong or spirituous liquors, or to keep an inn or tavern, public ordinary, or victualling-house, within the said city." (Laws of April 10, 1824, chap. 26, § 1.)

"No such license shall be granted to any person who is not, in the opinion of the said commissioners, of good moral character." (§ 8, *id.*)

The statute says, the defendants may grant licenses to such persons as they "deem fit and proper," and "of good moral character." The legislature is constitutionally competent to enact such a law. What an express statute expressly permits designated officers to do, the court cannot restrain them, by injunction, from doing.

The persons to be licensed are to be determined by the de-

pendants, in the exercise of their discretion, and that discretion cannot be made subservient, or subordinate to, the discretion of the courts. The court cannot restrain them from granting any licenses, for the simple reason that while courts, acting within the scope of these powers, enforce the law, they do so by acting in obedience to it, and not by assuming an authority paramount to it. The statute declares, that they may grant licenses, and that authority the courts cannot abrogate or restrain.

The court cannot interfere under the idea that the license system is a nuisance; whatever is permitted by a statute which the legislature is constitutionally competent to enact, is not, in judgment of law, a nuisance.

With the wisdom or expediency of a law, the courts have nothing to do. They are bound to administer the laws as they find them; and would be derelict in duty if they failed to do so in any case, on the ground that they deemed them unwise and inexpedient; nor are they at liberty to arrest the action of public officers, charged by statute with a public trust, and authorized to act according to their judgment and discretion, because the courts may think the statute conferring the authority pernicious in its consequences, and one that ought to be modified or repealed.

If the acts under which licenses are granted, are violated, the offenders subject themselves to a penalty, also to fine and imprisonment (§ 2, *id.*).

The injurious consequences alleged to result from the system and licenses granted, so far as the complaint shows, produce no pecuniary injury to the plaintiffs, differing in its character from that inflicted on every resident and tax-payer of the ninth ward. It is, of itself, a reason why the court could not interfere at the suit of an individual, to restrain a nuisance, when there is no ground for interfering, except that which is common to all the inhabitants of the ward.

While the statute continues in force, the only remedy any citizen has is to prosecute, when such cases occur, for a violation of duty in granting licenses, or for violations of the provisions of the act, by those to whom licenses may be granted.

I consider it entirely clear, that the court has no jurisdiction

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in the matter. The motion must therefore be denied, with ten dollars costs.

Culver & Parker, for plaintiffs.

R. J. Dillon, for defendants.

Approved, on consultation.

SMITH v. RIGGS.

The question of title to lands is, in all cases, a question of ownership.

The question does not arise in an action to recover damages for the breach of an agreement to convey lands, when the only issue made by the pleadings is, whether an inchoate right of dower in the wife of the defendant was a subsisting encumbrance.

In such an action, if the plaintiff recovers only nominal damages, the defendant is entitled to full costs.

(General Term. Before OAKLEY, Ch. J., DUKE, CAMPBELL, and BOSWORTH, JJ.)
May, 1858.

THIS was an action to recover damages for the breach of a covenant, by which the defendant bound himself to convey to the plaintiff, on or before a certain day, a house and lot in the city of New York, "by a good and sufficient deed, free from encumbrances." The cause was tried before Mr. Justice DUKE, at special term, by the consent of the parties, without a jury.

It was proved that the defendant had tendered to the plaintiff, on the day mentioned in the agreement, a conveyance in fee of the house and lot in question, and that the plaintiff had refused to accept the deed, on the ground, that it was not signed and acknowledged by the defendant's wife, so as to bar her dower. The court held, that he was justified in this refusal, and that the defendant, by not having procured and tendered a release of dower, had broken his covenant; but as it appeared that the sum, which the plaintiff had agreed to pay for the

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house and lot exceeded its market value, a judgment was rendered in his favor for only six cents damages. The propriety of the decision was not disputed, but the question which arose upon this appeal, was to which of the parties costs should be allowed. The judge, at special term, had affirmed the decision of the clerk, allowing full costs to the defendants, and the plaintiff appealed from the order.

G. Clarke, for the plaintiff, insisted on the following points.

I. The complaint alleges, that defendant was seized of the house and lot; that he contracted to sell to the plaintiff, and to give him a title free of encumbrance; and that the title offered was not a good and valid title, free of encumbrance, but on the contrary was defective. These positions were controverted by the defendant, and thus an issue was raised involving a question of title, and one which a justice of the peace could not try. Therefore, under section 304 of the Code, the plaintiff is entitled to costs.

II. If the plaintiff is not absolutely entitled to costs as of course under section 304, then it is a case coming within section 306, where the giving of costs is discretionary with the court. 1. It was an equity cause of action, and the plaintiff could have proceeded in equity to enforce performance of the contract (see note to section 306 of the Code); and had he done so, he would of course have been entitled to costs, as the court has decided the question of law in his favor. 2. If then he would have been absolutely entitled to costs if he had pursued that course, will not the court in the exercise of its discretion give the plaintiff costs when he has pursued the other course allowed by the law, on the same state of facts that would have given him costs in an equity suit? I cannot see why a court of law should deprive the plaintiff of costs, when, if he had proceeded before the same court in equity, on the same state of facts, he would have recovered costs, as of course. 3. The defendant was the party in fault; he broke his contract; the court has so decided, and nothing prevented the court from giving the damages claimed but the peculiar agreement made by the plaintiff with a third party. This ought not to avail the defendant, to screen

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him from costs. That circumstance did not render his conduct less objectionable. He and his wife evidently acted in bad faith; and they made use of a mere contrivance to avoid the fulfilment of the agreement. The plaintiff, therefore, on every consideration, is entitled to the exercise of the discretion of the court in his favor, as to the costs.

T. B. Scoles, for the defendant.

I. The defendant is entitled to costs, as a matter of course, by sections 304 and 305 of the Code of Procedure. This was an action for the recovery of money, where the plaintiff did not recover fifty dollars. It was a common law action for damages, not an equity suit for a specific performance. There was no prayer for alternate relief. The plaintiff did not even demand judgment for damages generally, but for a special and specific injury only, of which he gave no proof. In a common law action for damages, there is no judicial discretion as to costs. The matter is fixed by statute.

II. No question of title to land is presented by the pleadings, or came up on the trial. It was admitted by the pleadings that the defendant had title to the land; that his wife was dowerable; and that no release of dower was tendered to the plaintiff. The only questions raised, were, whether the plaintiff had performed the contract of sale on his part; if so, whether the defendant had performed it on his, and if he had not, what damage had the plaintiff proved. The defendant's title to the land was not at all in dispute; neither directly nor collaterally.

III. A justice of the peace could have tried this action just as he could any other action for an alleged breach of contract, for the simple reason, that no title to land came in question. He could construe the agreement, and assess the damages. There was nothing to oust him of jurisdiction. Had the plaintiff been willing to take his chance of recovering one hundred dollars or less, he might have tried this case in a justice's court as well as in any higher court. He claimed heavier damages, and went into a higher court: therefore he assumed the risk of costs, if he failed to recover an amount sufficient to carry costs in that court.

IV. Actions of this kind have frequently been brought, and nominal damages given; and it never was pretended before that the plaintiff was entitled to costs on the ground that the title to land came in question. In examining the various decisions upon the point, what constitutes a claim of title, not a single case will be found, in which it was contended, that in an action like this for a breach of contract of sale of land, title came in question. The absence of any such precedent, is all but conclusive against the plaintiff. In many cases where the title much more nearly came in question than in a case like the present, it has been decided, that title did not come in question. We refer to a few of them in illustration of the principle. "An answer setting up an entry and claim to land under a contract for sale, does not constitute a claim of title." (*Doolittle v. Eddy*, 7 Barb. S. C. R. 75.) "Title does not come in question where the defendant admits title, and claims under a contract." (*O'Reilly v. Davies*, 4 Sandf. S. C. R. 722.) "Where the plaintiff offered to show title, which was not done because admitted by the defendant, title did not come in question." (*Brown v. Myers et al.*, 7 Wend. 495.) "Where a plea of *liberum tenementum* had been put in, yet where the title was admitted so that an inquiry into the title was unnecessary, title did not come in question." (*LaFarge v. Eames*, 1 Wend. 100.) "Even in trespass *quare clausum fregit*, where a license to cross the plaintiff's land was the subject of controversy at the trial, upon which there was conflicting evidence, it was decided that title did not come in question." (*Ex parte Coburn*, 1 Cow. 578; 3 Johns. A. 450.) "An issue on a license to do or act on real estate, which would otherwise be a trespass, is not a claim of title." (*Launitz v. Barnum*, 4 Sand. S. C. R. 637; 18 Wend. 579.)

By THE COURT.—This is plainly an action at common law, in which the allowance of costs does not rest at all in the discretion of the court. Under sections 304 and 305 of the Code, either the plaintiff, or the defendant, must be entitled to full costs, and, unless the question of title was involved, they must be given to the defendant.

It is not necessary to affirm, that in an action like the present,
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the question of title, in the proper sense of the term, may not arise, so as to entitle the plaintiff to full costs, even where he recovers only nominal damages. It is sufficient to say, that we are satisfied that the question did not arise, in this case, upon the pleadings, or upon the evidence. The controversy turned wholly upon the question, whether an inchoate right of dower in the defendant's wife was a subsisting encumbrance, which was necessary to be removed by a release to enable the defendant to perform his covenant; and this was not a question of title, but of the legal construction of the agreement. It is admitted by the pleadings, that the defendant was the owner in fee of the house and lot, which he agreed to convey. The title of an owner is certainly not divested by an outstanding encumbrance, and, according to the decisions, the question of title is, in all cases, a question of ownership.

We entirely agree with the counsel for the plaintiff that an action like the present is no more fit to be tried by a justice of the peace than a suit in equity to enforce the specific performance of a contract; but looking at the issues made by the pleadings, we cannot say, that under the terms of the Code, as formerly under those of the R. S., this action might not have been tried by a justice, had the damages claimed not exceeded the limits of his jurisdiction.

The order appealed from is affirmed, but without costs.

LE ROY and another v. SHAW, impleaded with PATERSON.

The rule, that persons only severally liable cannot be included in the same action as parties defendants, has not, as a general rule, been altered by the Code.

The only exceptions are those created by § 120 of the Code.

No exception is created by § 167 of the Code, since the causes of action, which may be united under that section, must "affect all the parties to the action."

Semble, that when the action is brought upon a collateral undertaking for the debt of another, the complaint must aver that the promise was in writing.*

(Special Term, May, 1853.)

* *Vide* Thurman v. Stevens, *ante*, p. 609.

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THE action was brought, as against Paterson, for goods sold and delivered to him, and, as against Shaw, on his guarantee of payment for goods so sold, during one year, from June 11, 1852, to an amount not exceeding \$400. A balance of \$407.98 was alleged to be due, for which, with interest from January 5, 1853, judgment was prayed against both defendants. The defendant, Shaw, demurred to the complaint, and (among other causes) assigned the following.

I. That several causes of action have been improperly united in this, to wit:—1. That the action is against two persons, who, as appears by the said complaint, are not jointly liable on the same contract, and to the same extent. 2. That an action for goods sold and delivered to one defendant, is improperly united with an action upon a guarantee, or collateral undertaking, alleged to have been made by another defendant.

II. The guarantee being a collateral undertaking, and not being alleged to be in writing, facts enough are not stated to constitute a cause of action.

James S. Carpenter for the defendant, Shaw.

Hawley & Glover, for plaintiffs.

BOSWORTH, J.—Prior to the Code, persons only severally liable, could not be included in the same action as parties defendants. The only exception was that made by the statute relating to suits against the parties to bills of exchange and promissory notes. That the Code intended to continue the same rule is obvious,—first, from § 120, which provides, that “persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action, at the option of the plaintiff.”

If other sections of the Code, fairly construed, authorize the same proceeding, this section is idle.

The plaintiff contends that the causes of action, though several, arise out of the same transaction, or transactions connected with the same subject of action, and may, therefore, be united (§ 167).

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The answer to this is, that neither cause of action "affects all the parties to the action."

The cause of action arising on the guarantee does not affect Paterson; he cannot be charged by reason of it, and it imposes no liability on him. The cause of action for goods sold and delivered to Paterson, does not affect Shaw; he is liable only upon and by reason of his guarantee, and for the sum guaranteed.

By allowing several causes of action, arising out of the same transaction, to be united, it was only intended to allow such causes of action to be united as might arise against a sole defendant, or against several jointly.

To justify the presumption, that the plaintiff has a cause of action against Shaw, it must be assumed, that the guarantee is in writing. If the two actions can be united, then a purchaser of goods on credit, in open account, and one who has guaranteed his purchases to part of their amount, by a contract in writing, may be sued together; although the credit to the purchaser may be double the amount guaranteed, and the excess of credit has no connexion with the guarantee, and was not induced by it. I think persons severally liable, cannot be prosecuted together, unless they are severally liable, as parties, to a written contract or obligation, on which the names of both appear, as contracting parties.

Whether it is now necessary to aver, in an action against a third person, on a collateral promise, that his agreement was in writing, is not clear. That fact is indispensable to the existence of a cause of action against him. No such fact is averred. Is it to be presumed, that it was in writing?

In *Elting v. Vanderlyn* (4 J. R. 237), on a motion in arrest of judgment, the court ruled, that, whether the promise was in writing or not need not appear in the declaration, that it is matter of evidence only, and, after verdict, would be presumed to be in writing.

The reason of this rule is said to be, that the contract was valid at common law, though not in writing, and that when a statute intervenes, and makes a writing necessary in respect to such a contract, it is not necessary in counting on the contract, to allege it to be in writing, but proof of the writing may be

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made on the trial ; but where a matter is created by statute, and required to be evidenced by writing, the writing must be pleaded, with all attendant circumstances.

But the Code, as it now stands, has not only abolished all the forms of pleadings heretofore existing, but declares that "the rules, by which the sufficiency of the pleadings are to be determined, are those prescribed by this Act" (§ 140).

The fundamental rule as to a complaint is, that it shall contain "a plain and concise statement of the facts constituting a cause of action." The obvious design was, that the actual facts should be stated, and all that are indispensable to a cause of action. By the existing law, it is not enough to subject a person to liability for the debt of another, that he has, upon consideration, promised to pay it. He must have entered into a written agreement to pay it. It is not averred that any such agreement has been subscribed by Shaw. Whether the agreement is in writing or not, is more than a mere matter of evidence. The making of the agreement may be established, without such evidence, beyond doubt or cavil ; and yet, the party making it may not be liable. The making of a written agreement is an act or fact, essential to the creation of liability, and no such act or fact is averred.

But whether such an averment be now necessary or not, the ground of demurrer first assigned is well taken, and judgment must be entered thereon in favor of the defendant Shaw.

Approved, on consultation.

ANDREWS v. THE ASTOR BANK

In an action against the defendant as acceptor of a bill of exchange, which was addressed to J. L., President of the Astor Bank, and accepted by him, as president, the complaint did not aver that the bank accepted the bill, or that J. L. was president, or, as president, had any authority to accept.

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Held, that it sufficiently appeared upon the face of the bill, that it was drawn upon, and duly accepted by the bank.

Demurrer to complaint overruled, with costs.

(Special Term. May, 1853.)

BOSWORTH, J.—The plaintiff seeks to charge the defendant, as acceptor of a bill of exchange, a copy of which and of the acceptance thereof, is set out in the complaint. The complaint alleges, that the plaintiff, who is the payee of the bill, is the holder and owner of it; that no part of it has been paid, but that the whole amount of it is justly due to the plaintiff from the defendant; and prays judgment against the defendant for the amount of it, with interest from its maturity, besides costs.

The Code provides, that in an action upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specific sum which he claims. (§ 162.)

All that has been done in this case, and the instrument is unquestionably one for the payment of money, and for the payment of money only. The acceptor is the party primarily liable, and his contract is absolute and unconditional.

In support of the demurrer, it is contended, that as it is not averred that the bank accepted, nor that Lloyd was its president and authorized to accept, and did accept as such president, there is no connexion between the bank and the bill apparent on the face of the bill; that none is averred by the complaint, and, therefore, it does not state facts sufficient to constitute a cause of action.

The bill is addressed,

“To John Lloyd, Esq.,
“President of the Astor Bank,
“New York.”

And is accepted thus,

“Accepted,
“John Lloyd,
“President.”

I apprehend, that any ordinary man of common understanding, holding, or being offered such a bill, would read it as being a bill drawn on the Astor Bank, and accepted by the bank, by its president.

The complaint states everything relating to it, which the Code requires, § 162. The Code having enacted such a form of complaint to be good, I have neither the power nor the inclination to adjudge it to be bad.

The system of pleadings and practice superseded by the Code, did not require any more to be stated than this complaint contains.

It was enough to declare on the common counts, annex a copy of the bill, and a notice that the bill and acceptance thereof was the plaintiff's only cause of action.

The defendant was not at liberty to interpose a plea, unless he served with it an affidavit, that he had a good defence on the merits, to the bill or some part thereof.

The defendant is subjected to no inconvenience. If there is any defence, it is to be set up by answer. There can be no doubt for what the action is brought, nor what proof is required to sustain it, if the acceptance of the bill by the defendant be denied.

The Code having provided this form of complaint, the plaintiff must have judgment on the demurrer.

It must not be supposed that this decision is at all at variance with the prior decisions of this court in *Lord v. Cheesebrough*, 4 Sand. 696, and *Adler v. Bloomingdale*, 1 Duer, 601. In each of those cases, it did not appear, on the face of the complaint, that the defendant was certainly liable, but to show his liability, extrinsic facts were necessary to be averred. In each case, the note declared on was not an instrument for the payment of money only, within the meaning of the Code; but that a bill of exchange, when the action is against the acceptor, is such an instrument, cannot be denied.

The defendant, on filing an affidavit of merits, may withdraw the demurrer and put in an answer in ten days, on payment of the costs of the demurrer, and stipulating to take notice of trial for the June term.

KATTENSTROTH v. THE ASTOR BANK.

A motion for the appointment of a receiver, when the order to show cause against the appointment is served before the commencement of the suit, will be denied as irregular.

It is very doubtful whether the Superior Court has jurisdiction of a proceeding under the R. S. for the dissolution of a moneyed corporation.

It is clear that the court has no authority to exercise the visitatorial powers that were formerly vested in the Court of Chancery.

(Special Term. Bosworth, J.)

May, 1853.

BOSWORTH, J.—This action is brought to obtain a decree dissolving the corporation. A receiver is prayed for to wind up the affairs, and take the control of its assets; and also an injunction to restrain the defendant, and its officers, from interfering with the property. A motion is now made for the appointment of a receiver.

The motion is irregular. When the order to show cause was served, no action had been commenced. The summons was not served until the return day of the order. This is clearly irregular, and the objection having been taken preliminarily, it is an answer to this motion.

Whether this court has jurisdiction of such an action, it is unnecessary to decide on this motion.

Prior to the new constitution, the jurisdiction was vested in the Court of Chancery. (2 R. S. 462.)

The act of 1847 (Vol. i., p. 323, Laws of 1847) § 16, devolved it upon the Supreme Court.

If this court has jurisdiction, it acquires it under § 33 of the Code, sub 3.

The corporation is created under the laws of this state; is located, and transacts its business, in the city of New York.

The proceeding is, perhaps, one coming within the definition of an action. (Code, § 2.)

Whether § 471 has the effect to continue the jurisdiction exclusively in the Supreme Court, and only conforms the proceed-

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ings to be had there to those prescribed by the Code, it is unnecessary to determine on this motion.

If this court has jurisdiction, then the mayor's courts of cities, and the recorder's courts of cities, also have it with respect to moneyed corporations, created under the laws of this state, and transacting their business in the cities where such courts are organized.

I think it clear that the Code has not given this court authority to exercise any of the visitatorial powers over moneyed corporations, which were vested in the Court of Chancery by art. 2, of title 4, of chap. 8 of 2 R. S., p. 462.

If it has not, the doubt is not weakened, whether it has given to this court jurisdiction of any of the proceedings regulated by that article.

Perhaps sub. 3 of § 33 of the Code only relates to actions to recover a debt or damages, or such equitable relief as one natural person may claim of another.

No case is made authorizing any court to proceed under § 38 of 2 R. S. 463. Whether a case is made under § 39, will be one of the questions to be determined, if the motion is renewed.

The motion is denied, with \$10 costs, but without prejudice to plaintiff's right to renew it, if so advised.

E. Sandford, for plaintiff.

H. E. Mather, for defendants.

Approved on consultation.

MARGARET KLEIN, by her next friend, John P. Treshman, v.
JACOBUND HENTZ and MICHAEL HENTZ.

In an action to recover damages for slanderous words spoken of a married woman, if the words are actionable *per se*, the husband is a necessary party as plaintiff.

Where the words are actionable only by reason of special damage, the husband must sue alone.

(May Special Term, 1858)

Klein v. Hentz

BOSWORTH, J.—This case comes before the court on a demurrer to the complaint. The plaintiff is a married woman, and brings the action to recover damages for slanderous words spoken of her by the defendants, whereby, as it is alleged, special damage has resulted; such as that her husband has been alienated from her, the support theretofore given her by her said husband has been withdrawn, and whereby she has been often deprived of food, raiment, and the necessities of life; and that parties have refused to employ her, and pay her for her services, which they otherwise would have done.

The demurrer assigns for cause, that the husband is not a party, and is a necessary party plaintiff.

Beach v. Ranney, 2 Hill, 309, expressly decides two points.

First, That when the words are actionable *per se*, the husband must be joined with the wife as a party plaintiff.

Second, That where the words are not actionable *per se*, the husband must sue alone.

The husband is bound by law to provide support and maintenance for the wife. If she is deprived of the gratuitous aid of friends in consequence of the slander, the damage, in a legal point of view, results to the husband. In judgment of law, no damage results to her, unless she has been injured in her property or person. If the words are actionable *per se*, damage may result to her, but the action must be in the name of herself and husband. If actionable only by reason of special damage, the damage results to the husband and not to the wife.

The Code has not changed the rule in relation to parties, or the law arising on such a state of facts, as formed the grounds of adjudication in *Beach v. Ranney*, Code, 114.

The defendant is entitled to judgment. The plaintiff may amend the complaint within twenty days, both as to parties, and as to allegations of facts, on payment of the costs of the demurrer.

Approved on consultation.

ISAAC R. VARIAN & others v. THOMAS G. STEVENS & others.

The superior court has jurisdiction of an action for the partition of real estate, situate within the city and county of New York, irrespective of the residence of the parties (Code, § 123, sub. 2, and § 82, sub. 1).

Jurisdiction over the person is as fully acquired by the voluntary appearance of the defendant, as by service of a summons (Code, § 189).

When, upon the petition of infants over the age of 14, a guardian *ad litem* has been appointed in a partition suit, the order is valid, although no summons had been previously served upon the infants.

The jurisdiction of the court is, therefore, complete, when an answer on behalf of the infants has been put in by the guardian so appointed.

The appointment of a guardian, *ad litem*, in a partition suit, is regulated by the R. S., and is made by the court (2 R. S., § 2, p. 817).

To such an appointment, the cases of *The People v. Hoffman* (7 Wend. 487) and *Grant v. Van Schoonhoven* (9 Paige, 225) have no application.

The personal service of a summons upon an infant of the age of 14, under § 184, sub. 4 of the Code, has no other use than to hasten the period, within which the plaintiff may apply for the appointment of a guardian, when the infant himself neglects to apply, since, until this appointment is made, there can be no further proceeding against the infant.

When it is not denied that the signatures of infants to their petitions for the appointment of a guardian *ad litem* are genuine, it is no objection to the validity of the judgment in the action in which they were defendants, that it does not appear upon the record, that proof was furnished to the court that the signatures were genuine. It will be presumed that proof was given.

A variance in the name of an infant as stated in the complaint, and in the petition for the appointment of a guardian, may be disregarded as immaterial, both under the Code and under the R. Statute of Amendments (Code, § 176 ; R. S., § 7, sub. 10, p. 425).

Order, compelling a purchaser to take a title, to which the only objections were those above stated and overruled, affirmed, with costs.

(Before OAKLEY, Ch. J., BOSWORTH and ECKERT, J.J.)

General Term, June, 1858.

THIS was an appeal by W. H. Paine, from an order made at special term, directing him to complete a purchase made by him, of certain lots, sold under the judgment in this action, which was an action for the partition and sale of real estate, situate in the city of New York. The facts sufficiently appear in the opinion of the court.

Varian v. Stevens.

A. W. Clason, Jun., for appellant.

James N. Platt, for respondents.

BY THE COURT. BOSWORTH, J.—This was an action for the partition of real estate, situate in the city of New York.

The real estate was sold in parcels, pursuant to a judgment in the action. W. H. Paine bought certain lots at the sale, and now appeals from an order made at special term, directing him to complete his purchase.

The purchaser objects, that the proceedings and sale are ineffectual to vest in him the title to the lots purchased, on the grounds:—

1. That the summons was not served on the minors, George W. Varian and Letitia Varian, personally, and that, therefore, the appointment of a guardian *ad litem*, for them, was *coram non judice*, and void.

2. That while the summons and complaint described one of the defendants as "Letitia Varian," the petition for the appointment of guardian was signed "T. Letitia Varian."

The action being for the partition of real estate, situate in the city and county of New York, this court has jurisdiction of it, irrespective of the residence of the parties interested (Code, § 123, sub. 2, and § 33, sub. 1).

Jurisdiction over the person may be acquired in two modes: First, by the service of a summons on the defendant, whether an adult or a minor, if over fourteen years of age (Code, § 134, sub. 4). Second, by the voluntary appearance of the defendant, which is declared by the Code to be "equivalent to personal service of the summons upon him" (Code, § 139).

The two minors were severally over the age of fourteen years, and appeared, and put in an answer, by their guardian *ad litem*, appointed by an order made in the action on their own petition. The guardian *ad litem* was their general guardian.

They, therefore, appeared properly, and the only question on this branch of the case is, was the appointment of the guardian valid?

It is objected to the appointment, that the court had no juris-

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diction to make it, unless a summons had been first personally served on the infants, and upon proof of that fact—notwithstanding the infants themselves petitioned to have the appointment made.

To this, it may be answered, that no case or statutory provision has been cited, which sustains this point.

The People v. Hoffman, Judge of Herkimer Common Pleas (7 Wend. 489), only decides that, in an action at law, against an infant, commenced by the service of a declaration, the infant could not be required to appoint a guardian *ad litem*, and that the plaintiff could not procure one to be appointed, on the infant's default. That decision was under the statute relative to such appointments, in actions at law, against infants, which authorizes one to be made, on the motion of the plaintiff, only in the event, that the "infant defendant neglects, for twenty days after the return day of the process by which he was arrested, to procure the appointment of a guardian to defend the suit" (2 R. S. 446, §§ 8, 10).

The case of *Grant & wife v. Van Schoonhoven et al.* (9 Paige, 255) relates to the appointment of a guardian made by a Master in Chancery, under the 146th rule of the late Court of Chancery, and not one made by the court itself.

That decision has no application to this case. The 146th rule, like the 100th equity rule, established in July, 1847, and the 57th rule of the Supreme Court, adopted in August, 1849, prohibited the appointment, under it, of a guardian *ad litem*, in a partition suit.

The appointment of a guardian *ad litem*, in a partition suit, is regulated by the Revised Statutes, in relation to the partition of lands, and must be made by the court (2 R. S. 317, § 2).

Those statutes allow guardians *ad litem* to be appointed for infant defendants, on ten days' notice to them, or to their general guardians, whether the minors reside in or out of the state, and, of course, whether they have or have not been served with process (Laws of 1833, p. 311, § 1).

Prior to the Code, the Court of Chancery, under these statutes, even in case of infants residing out of the state, so that no notice could be given to them or to their general guardian,

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appointed the registrar, or a clerk of the court, their guardian *ad litem*, to defend the suit (*Minor et al. v. Betts et al.*, 7 Paige, 596).

In *Concklin & others v. Hall & others* (2 Barb. Ch. R. 137), the purchaser at a foreclosure sale was compelled to complete his purchase, notwithstanding there were infant defendants, for whom a guardian *ad litem* had been appointed, on the application of the plaintiff, by a peremptory order, instead of the usual order, that the person named be appointed guardian, unless the defendant, within ten days after the service of the order, should procure the appointment of another person. The court held, that the appointment was regular, so far at least as to protect the purchaser under the decree, and that there was no unbending rule of practice on the subject. (See *Smith v. Bradley*, 6 Smedes & Marsh. 485; *Nelson v. Moon*, 3 McLean, 319.)

The Code provides (§ 134, sub. 4), that in a suit against an infant defendant over 14 years of age, the summons must be served on him personally. But the service of the summons on him is of no possible consequence, except to hasten the period within which the plaintiff may procure a guardian to be appointed for him, if he neglects to apply himself (*id.* § 116, sub. 2); as no further proceedings can be taken against him until such a guardian is appointed.

Section 116 does not make it a condition to the infant's right to apply, that he shall have been previously served with a summons. Such an act cannot add to his capacity or improve his discretion. The only effect of the section is, to deprive him of the right to apply, unless he makes the application within twenty days after the service of the summons; and unless, after that time, no application has been made by the plaintiff (Vide *McConnell v. Adams*, 3 Sand. Sup. C. R., p. 72).

In this case the action had been commenced; infants were parties. They were of an age which authorized them to apply, under the statute, for the appointment of a guardian. They did so apply; and, on their application, their general guardian was appointed.

The guardian *ad litem* having been appointed, having con-

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sent to act, and having given the requisite security, it was not only his right, but his duty, to appear and defend the action, and he did so.

His appearance for the infants, after being thus appointed, was as regular and valid, as that of a retained attorney for an adult (2 R. S. 317, §§ 3, 36, 81, 89).

The objection, that one of the infants was named in the summons and complaint as "Letitia Varian," while she was described in the petition for the guardian *ad litem*, as "T. Letitia Varian," is one which § 176 of the Code requires us to disregard. It is not pretended that neither was her true name, and if either was, the defect was cured by the Statute of Amendments (2 R. S. 425, § 7, sub. 10).

As to the objection, that it does not appear that any proof was furnished to the court, that their signatures to the petition were genuine, it is enough to say, that it does not appear that such proof was not furnished, and that there is now no pretence that they are not in fact genuine.

We all concur in the opinion, that there is nothing in any of the objections presented, which can throw any doubt upon the title acquired by Mr. Paine, to the lots purchased by him, and that the order appealed from should be affirmed, with costs.

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A counter claim, as defined by the Code, includes only causes of action existing against the plaintiff on the record, and on which, under the old system, an action at law, or a suit in equity, might have been maintained against him.

Hence, in an action against the maker of a negotiable note by an endorsee, facts that, admitted to be true, amount only to a valid counter claim against the payee and endorser, cannot be set up, for any purpose, in the answer of the defendant.

But, if the facts, although pleaded as a counter claim, constitute a good defense by way of a set-off, or recoupment, and the note was transferred under circum-

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stances that rendered it subject to all existing equities between the maker and payee, they may be set up as a bar, in whole or in part, to the plaintiff's recovery.

Upon this ground, demurrer to the answer overruled, with costs.

(Special Term. Before Bosworth, J.)

May, 1853.

BOSWORTH, J.—This action came before the court on a demurrer to defendant's answer.

The action is on a note made by the defendant, dated August 26, 1851, payable at 4 months from its date to the order of the Hudson Manufacturing Company, a corporation created by the laws of the state of New Jersey, and by the corporation, endorsed to the plaintiff.

The answer admitted the making and endorsement of the note, and that no part of it had been paid. It stated as a defence, that on the day of the date of the note, the defendant and payee of the note made a written contract under seal, by which, among other things, it was covenanted and agreed between them that the defendant, from the date of the contract and the 1st of January, 1857, should be the sole agent of the payee to sell all the India rubber and gutta percha goods manufactured by the payee during that period; that the payee within the first year, from October 1, 1851, should make, or cause to be made, such goods of the worth of \$100,000, in case the defendant could sell and dispose of that quantity within that period, and thereafter to the worth of \$300,000 per annum, upon like condition; that the payee would give to the defendant, as such agent, the exclusive sale of all its goods and wares (except the sale of certain enumerated articles), during the stipulated term of such agency; and pay and allow the defendant for such sales in each year a commission of 12½ per cent. on all sales not exceeding \$100,000, and 7½ per cent. on all sales over that sum and not exceeding \$200,000, and of 10 per cent. on all sales in each year exceeding last named sum. That defendant on his part agreed to make the sales as such agent, guarantee them, render a true account of them semi-annually, and pay to the corporation the net proceeds, one-half in his own notes, and one-half in cash and business paper received from said sales.

That it was further agreed, that the corporation should trans-

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fer to the defendant, at par, 800 shares of its capital stock, and the defendant agreed to take it and pay for the same in his own notes of \$2000 each, payable at specified periods; and the corporation covenanted to indemnify him for any loss on said stock, occasioned by the failure of the corporation to perform the said contract on its part.

The defendant, in pursuance of the contract, took the stock, and gave his notes as he agreed to do, of which the note in suit was one; that he accepted and entered upon the agency, and was, and ever since has been able and willing, and offered, to perform on his part; that he could have sold in each year the largest quantity of goods named, but the corporation wholly failed to perform the contract on its part; did not furnish, and has not furnished such goods to the defendant for sale according to the contract, and thereby has deprived, or attempted to deprive, the defendant of his commissions on such sales; and his stock has thereby become greatly depreciated in value, and almost worthless, whereby this defendant has sustained damages to the sum of \$95,000, or thereabouts.

That the note sued upon was transferred to the plaintiff after it became due; that he was at the time an officer of the corporation, and had full knowledge of the facts herein before stated.

Which damages the defendant claims to set-off, recoup, or prove as counter-claim to the demand of the plaintiff, and to have this action dismissed, with costs.

To this answer, the plaintiff interposed a demurrer, and assigned the following causes, viz:

1. That the plaintiff is not a party to the alleged contract, or agreement, set forth in said answer.

2. That the plaintiff is not liable to the defendant for any damages sustained, or incurred by the defendant, by reason of the alleged breach of the said agreement on the part of the Hudson Manufacturing Company.

3. That the said alleged damages are not the legal subject of set-off, reconpment, or counter-claim against the claim made by the plaintiff in and by his complaint in this action.

This action was commenced in December, 1852.

John E. Develin, for plaintiff.

D.—II

Gleason v. Moen.

T. H. Rodman, for defendant.

BOSWORTH, J.—If the defence set up in the answer is strictly a counter-claim, and only that, the demurrer is well taken. A counter-claim, as defined by § 150 of the Code, must be a claim or demand existing against the plaintiff, as a party to the contract, or transaction, out of which it arises. The language of the Code is too clear and explicit to be misunderstood. The counter-claim mentioned in section 150, must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action.

1. A cause of action arising out of the contract, or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

These counter-claims may be such causes of action as have heretofore been denominated legal, or equitable, or both. (§ 150.)

It is obvious that a counter-claim, as here defined, includes only causes of action existing against the plaintiff on the record, and on which, under the old system, an action at law, or a bill in equity, could have been maintained against him at the suit of the defendant, according as the matter was one of legal or equitable cognizance.

The second sub-division would include,

1. Set-off of a demand existing against the plaintiff.

2. Any claim arising on a contract made by him, whether sealed or unsealed, and whether the damages were liquidated or unliquidated.

The first sub-division would include,

1. All breaches on the part of the plaintiff of any promise or covenant on his part, contained in the contract on which the action was brought.

2. Any equitable relief, to which a party is entitled against a legal demand, and which formerly could only be had by filing a bill in Chancery. Also the affirmative relief, which, in equity suits, could be had only by a cross-bill.

Hence § 274 provides, that in the final judgment, the court "may grant to the defendant any affirmative relief to which he may be entitled."

The interposition, and proof of the counter-claim, secures to a defendant the full relief, which a separate action at law, or a bill in chancery, or a cross-bill, could have secured to him on an allegation and proof of the same facts. And this provision of the Code relates to only such causes of action as exist against the plaintiff, and might in their nature be the basis of an action against him at the suit of the defendant.

If the defence set up is a counter-claim, or nothing, the demurrer must of course be sustained, as the matters alleged create no right to recover damages from the plaintiff, nor can be made the basis of any equitable relief against him.

The insolvency of the payee of the note is not averred, and no case is made for relief on that ground.

If the facts averred and admitted by the demurrer would constitute a defence to the note, in the hands of an endorsee taking it after it fell due, according to the settled principles of law existing when the Code was enacted, it is a defence still, but not one falling within the definition of a counter-claim contained in § 150.

§ 112 expressly provides that, in the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to set-off or other defence existing at the time of, or before notice of the assignment. The only exception made is that of a negotiable promissory note, or bill of exchange, transferred in good faith, and upon good consideration, before due.

In this case, the note was not only transferred after it was due, but with actual knowledge by the endorsee at the time of the transfer, of the facts set up as defence.

When a note is negotiated after it becomes due, that fact alone subjects it, in the hands of the endorsee, to every defence that existed in favor of the maker against the payee at the time of the transfer. (1 Joh. Cas. 51, p. 331; 2 Caines' Cas. in Error, 303; 2 J. R. 306; 2 J. R. 118; 8 J. R. 454; 1 Cowen, 396.)

It is alleged that by reason of the breach by the payee of the contract on its part, the stock for which the note was given

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has been depreciated in value, and that such depreciation exceeds the amount of this note. If such are the facts, the consideration of the note had failed before it was transferred. That would be a good defence against the payee, and the defence is equally available against any endorsee taking the note after it fell due, and with knowledge of the facts.

. *Batterman v. Pierce* (3 Hill, 171) was an action by payee against maker on a note given for wood purchased of the payee. As part of the transaction, the payee promised to indemnify the maker against any damage to the wood, in consequence of the burning of a fallow adjoining the wood. In burning the fallow the wood took fire and was consumed. It was held, that the defendant was entitled at law to have a recovery on the note, reduced by a sum equal to the damages resulting from burning the wood.

The stock, in this case, has been rendered nearly worthless by acts against which the payee covenanted, and which covenant was made at the same time as the note, and related to the same subject matter. In that respect, the case is like *Batterman v. Pierce*, the only difference being that that suit was between the payee and maker, while this is between the maker and an endorsee with notice, and taking the note when past due.

It is in substance a case of the total or a partial failure of the consideration of the note, as the covenant of the payee, as well as the stock, formed the consideration of this and of the other notes given at the same time.

If a defence of this character is available against a note negotiated after it fell due, and with notice of the facts, the answer cannot be demurred to, even if sufficient facts are not stated to constitute a good defence.

No new matter in an answer can be demurred to except such as constitutes a counter-claim. (*Quin v. Chambers*, decided by the General Term, March 26, 1853.)*

In the case cited, this court indicated what it deemed to be the appropriate remedy in such a case.

The demurrer must be overruled, with costs, and permission is given to withdraw it on payment of the costs of the demurrer.

* Reported 1 Duer, 678.

McCHAIN and another v. McKEON & DUFFY

Where an execution issued against two joint debtors has been levied upon the property of one of them, the plaintiff will not be allowed to countermand it, and issue a new execution for the purpose of making a levy upon the sole property of the other defendant.

Such a proceeding is emphatically unjust and illegal, when it appears that the first execution was withdrawn at the request of the debtor upon whose property it was levied, and with the express purpose of screening him from the payment of any part of the debt, and collecting the whole from the property of his co-defendant.

When the first execution so levied is not withdrawn, and another issued with the consent of all the defendants, the court will order the second to be set aside, and the first to be returned satisfied.

The rule that a levy, under an execution, upon sufficient property to satisfy the judgment, does not operate *per se* as a satisfaction, is only applicable when the collection of the debt, by force of the levy, is not defeated by the act or fault of the plaintiff.

An assignee of the judgment stands in the same position as the plaintiff upon the record, and the legal consequences of his acts are the same as of those of the plaintiff.

(Special Term, June, 1853.)

MOTION to set aside a second execution, and to compel a return of the first as satisfied. The facts are fully stated in the opinion of the judge.

EMMET, J.—A judgment for \$188.64 was obtained in this case, against the defendants, as joint debtors. They had been partners in business, had quarrelled, and the partnership accounts had not been settled.

The defendant, Duffy, resides in this city; the defendant, McKeon, in Richmond county.

An execution on the judgment was issued to the sheriff of New York, who levied on the goods of Duffy, and placed a man in charge of them for safe keeping. It does not appear that any inventory was made, but it is not disputed that the property thus levied on was sufficient to have satisfied the execution.

While matters were in this position, Ralph S. Anderton, a

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friend of Duffy, and at his request, purchased and took an assignment of the judgment from the plaintiffs. The application for this assignment to Anderton was made by Duffy, and \$100 of the money given for the judgment, was paid by a check of one Lawson Jones, drawn payable to Duffy's order. The remainder was paid by Anderton's own check for \$93. Anderton swears that he purchased the judgment on his own account, and that he merely borrowed Lawson Jones's check from Duffy, and that he afterwards took it up, and returned it to Duffy.

On the 2d of June, Duffy and Anderton went together to Richmond county, filed a transcript of the judgment with the clerk there, delivered a new execution to the sheriff of that county, and directed him to levy on McKeon's property without delay, which he accordingly did. The exact date of this second levy does not appear, nor is it important.

On the 3d June, the sheriff of New York discharged the keeper, whom he had employed, from the custody of Duffy's property.

On the 4th, Duffy paid the sheriff of New York, \$14.42, for fees of the levy made on his goods, and their safe keeping.

On the 5th, a written consent was obtained from the attorneys for plaintiff, directed to the sheriff of New York, that, on payment of all fees upon the execution, the same might be countermanded; and, on the same day, a countermand of such execution, signed by Anderton, assignee of the judgment, was directed to the sheriff of New York; and, on the 9th, the execution, endorsed "countermanded," (without date) was returned and filed in the clerk's office.

The defendant, McKeon, now applies for an order, that the execution, which was issued to the sheriff of New York, be returned "satisfied," and that all proceedings on the judgment, and on any execution issued to the sheriff of Richmond county, be stayed, or for such other relief as he may be entitled to.

It is clear that Anderton, even regarding him as the *bona fide* assignee of this judgment, stands, in regard to the questions now raised, in precisely the same position that the plaintiffs would have stood in, if no such assignment had been made. He took the judgment, subject to whatever the legal effect of the exe-

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cution and levy on Duffy's goods may have been ; and whether the countermand of that execution, and the waiver of that levy, were his acts, or the acts of the plaintiffs, is wholly immaterial. It will simplify the consideration of this point, therefore, to throw the assignment out of view, and regard this transaction as if the plaintiffs themselves had been the sole actors in it. The question, then, would be simply this—Can a judgment creditor of two joint debtors, having already issued an execution, and levied upon sufficient property of one of the debtors, countermand and abandon that levy, for the express purpose of levying for the whole debt, under a second execution, upon the individual property of the other debtor ?

It is perfectly well settled in this state, that a levy on sufficient personal property to pay the debt, does not always satisfy the judgment (*Green v. Burke*, 23 Wend. 490 ; *Ostrander v. Walter*, 2 Hill, 329 ; *The People v. Hopson*, 1 Denio, 574). In the latter case, Judge Bronson emphatically says, " If the broad ground has not yet been taken, it is time it should be asserted, that a mere levy upon sufficient personal property, without anything more, never amounts to a satisfaction of the judgment ;" and he reiterates this proposition in these words : " without something more than a mere levy, the judgment is not extinguished." This general proposition plainly admits, however, that a levy on sufficient property may, under certain circumstances, be a satisfaction of the judgment ; and in the case of *Green v. Burke*, above referred to, where Justice Cowen gave the subject a very full and elaborate discussion, while the same general proposition was decided, that a levy under an execution against sufficient property, was not, *per se*, a satisfaction of the judgment, it was thus qualified : " that if the levy fail to produce satisfaction in fact, without any fault of the plaintiff, he may proceed to obtain execution of the judgment." Now, as a corollary from this, it would seem to follow, that, if it was the fault of the plaintiff, that the levy did not produce satisfaction in fact, he may not proceed otherwise to obtain such satisfaction.

We must assume that the levy in this case, made by the sheriff of New York, would not have failed to satisfy the execution and judgment, if that sheriff had been allowed to

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proceed, and sell under it. That result was defeated by the plaintiffs' own act, and it was their fault, therefore, that the levy failed to produce satisfaction. This brings the case clearly within the principle of that decision, and the principle itself is so obviously founded in justice, that its soundness can hardly be questioned.

But this application rests upon stronger grounds than the mere interference of the plaintiffs, or of Anderton, their assignee, to prevent the first levy from being effectual. The presumption is strong, upon the facts, that, if Duffy was not the real purchaser of the judgment, it was, at all events, purchased at his suggestion and request, for the express purpose of screening him from the payment of any part of it, and of enforcing it exclusively against his co-defendant. No court, exercising equitable powers, should permit such an attempt to be successful. The primary equity of the case, while the partnership accounts between the defendants remain unsettled, is, that each should pay one-half of this judgment; but as the case is not now before the court in a shape for such an adjustment, the relief, on this motion, must be by an order, that the execution issued to the sheriff of this county be returned satisfied, as of the day when it was countermanded, and that all subsequent proceedings on the judgment be set aside. The plaintiffs have been paid, and the defendant, Duffy, will, no doubt, save Mr. Anderton harmless, from the loss of any money which he may have paid or advanced for the purchase of the judgment. No costs are allowed to either party on this motion.

This decision was affirmed at General Term.

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When a complaint is not properly verified, the verification is a nullity; but the error does not affect the regularity of a subsequent judgment.

It appearing that an order, extending the time to answer, together with a copy of the affidavit upon which it was founded, and which stated the name of the

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defendant's attorneys, and his absence from the city, had been served upon the plaintiff's attorney,

Held, that the service thus made, was equivalent to a notice of appearance.

Held, that as the damages had been assessed without notice to the defendant, the judgment entered thereon was irregular.

(At Chambers, June 22, 1853.)

DUER, J.—The defendant moves to set aside the judgment as irregular, upon two grounds : 1. That the complaint is verified by an affidavit which, although it purports to be made by the plaintiff himself, is sworn to by his attorney ; and, 2. That no notice of the assessment of damages by the clerk, was served upon the defendant, or his attorney.

The first objection may be at once dismissed. The defect in the verification rendered it a nullity, but had no effect on the validity of the judgment. It merely relieved the defendant from the necessity of answering under oath.

The second objection, however, I think has not been answered. It is proved, and is not denied, that the defendant obtained an order extending the time to answer, founded upon an affidavit, stating the name of the attorney whom he had employed, and his absence from the city, and that a copy of the order, and of the affidavit, were duly served upon the plaintiff's attorney. By the service thus made, the plaintiff was informed that the action was meant to be defended, and that the defendant had employed an attorney for that purpose ; and, I cannot doubt, that the information so given, was equivalent to a formal notice of appearance in the action. The defendant was, therefore, entitled, under § 246, sub. 1, of the Code, to four days' notice of the assessment by the clerk, of the amount claimed to be due, and as no such notice was given, either to the defendant or his attorney, the assessment, and the judgment founded upon it, were irregular, and the motion for setting them aside must be granted.

There is another objection to the regularity of the assessment, to which, without meaning to decide it, I shall briefly advert. It appears from the complaint, that the action is founded upon a promissory note, payable, not absolutely, but upon a condition, namely, the sale, by the defendant, of certain property then in his hands. It may be doubted, whether such a note is

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an instrument for the payment of money only, within the meaning of § 246, and, consequently, whether the clerk, when he assessed the amount due, ought not to have required proof that the contingency, upon which the defendant's liability depended, had in fact occurred.

Judgment set aside, with costs.

OAKLEY, Ch. J., concurred.

HIGGINS and another v. P. FREEMAN, and J. ROCKWELL, Administrator of C. P. Freeman.

In an action to recover a debt contracted by partners, a surviving partner and the personal representative of a deceased partner, cannot be united as defendants.

The surviving partner is alone liable at law, and it is only when the remedies against him are exhausted that relief may be had in equity against the representatives of the deceased partner.

But as the objection to such a joint action appears upon the face of the complaint, it cannot be taken in an answer, but must be raised by a demurrer.

It is not waived, however, by the omission to demur, but as the complaint shows no cause of action against the representative of the deceased partner, it may be taken advantage of upon the trial under § 148 of the Code.

A defendant against whom a judgment is prayed by the complaint, although no summons has been served on him, has a right to appear and answer under § 139 of the Code.

In an action upon a promissory note, an answer, which fails to contradict the allegations in the complaint, showing the possession and property of the plaintiff, but merely denies their right to prosecute as owners, is plainly frivolous (Special Term. May, 1853.)

THE nature and grounds of the motion in this case are fully stated in the opinion of the judge.

Dillon and O'Gorman, for plaintiffs.

C. M. Tracy, for defendants.

BOSWORTH, J.—The complaint alleges that Phineas &

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Charles Freeman, being partners, made and delivered a note of their firm to the plaintiffs, which is wholly unpaid. That subsequently Charles Freeman died, and that "said Phineas Freeman and James Rockwell have been duly appointed joint administrators of all his estate and effects."

It prays, "that the defendants be adjudged to pay the plaintiffs" the amount due on the note, with the costs of this action. The defendant Rockwell has not been served with the summons.

The defendants have both appeared and united in an answer, which states, first, that they do not know whether the plaintiffs own the note, or are entitled to have and demand payment of the same. Second, that Phineas Freeman survived Charles Freeman, is still living, and resides in the city of New York; and objects that this action cannot be maintained against them as administrators, by reason of anything stated in the complaint, while said Phineas so survives.

To their answer they annex a notice, that they will prove on the trial, that there are other unpaid debts of the same class.

The plaintiffs move to strike out all of the answer except the first part, which puts in issue plaintiffs' ownership of the note, or that it should be so altered "as to stand for the answer of Phineas Freeman, the defendant served."

The answer appears to have been drawn under the idea, that this action is one against both defendants as administrators, and only that; and their counsel contended on the argument, that it could not, when fairly construed, be regarded as an action against Phineas as survivor, and also against him and Rockwell as joint administrators.

The plaintiffs' counsel insists that it is an action against Phineas as survivor; that Rockwell is made, nominally, a party as administrator; that he has no right to appear and answer until served with the summons; that if the court thinks he could not properly be made a formal party, his name should be stricken from the pleadings, and if he can be, that then the part of the answer to which the motion relates should be stricken out.

The complaint contains every averment necessary to a good complaint against Phineas Freeman as survivor.

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It also avers the death of Charles Freeman ; the due appointment of both defendants as his joint administrators ; and prays a judgment *in personam* against both defendants.

It was well settled, prior to the Code, that if one of two joint debtors died, an action at law would only lie against the survivor. (1 Chitty's Plea. 57.)

If the executors or administrators of the deceased party were sued, they might plead that the debt was a joint one and the survivorship of the other debtor, or give it in evidence under the general issue. (*Grant v. Shurter*, 1 Wend. 149.)

In *Marshall & Jenkins v. De Groot*, administratrix (1 Caines' Cases in Error, 122) a bill was sustained against the administratrix of one of three joint debtors who died solvent, after the remedy at law had been exhausted against the survivors, who were insolvent.

There is no allegation in this complaint of the insolvency of the survivor, Phineas Freeman.

No facts are stated on which an action can be maintained against the administrators, as it appears on the face of the complaint that Phineas Freeman is surviving. This objection cannot be taken by answer, because it appears on the face of the complaint. (Code, § 147.)

If it is improper to make the survivor and the representatives of the deceased debtor parties to the same action, or to unite a cause of action against one of them as a contracting party, with one against the representatives of the other joint debtor, as such, then these defects appear on the face of the complaint, and can be taken advantage of only by a demurrer. (Code, §§ 144, 147, and 148.)

I think the plaintiff is wrong in the position, that a person named as defendant, and against whom personally a judgment is prayed, has no right to appear and answer until he has been served with a summons.

The Code declares the voluntary appearance of a defendant equivalent to personal service of the summons on him. (Code, § 139.)

This assumes that he has a right to appear. It subjects him to the same liabilities as if personally served with process, and it would be a strange construction of this part of the Code that

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should hold, he did not thereupon acquire all the rights of a party actually served.

The practice was settled in chancery in accordance with the view here expressed, and numerous cases on the subject are collected in Vol. i of Barb. Ch., p. 81, under the head of "Appearance Gratia."

If on the facts stated in the complaint, no action can be maintained against either defendant as administrator, this objection is not waived by omitting to demur (Code, § 148), but it may be taken at the trial.

The plaintiff should be permitted to amend his complaint, by striking out the name of Rockwell as a party, and also the part of it averring the grant of administration, and by praying for judgment against Phineas Freeman only.

And all the answer should be stricken out, except that part which attempts to put in issue allegations of the complaint.

The only questions are, on what terms the order should be made. The defendants have put in an answer not recognised by the Code.

It does not controvert any material allegation of the complaint. The complaint avers that the firm made the note payable to their own order, and endorsed and delivered it to the plaintiffs; and that "the plaintiffs are now the lawful holders and owners of the note."

The answer does not controvert the facts that the firm delivered the note to the plaintiffs, and are now the lawful holders of it. It says the defendants have not any knowledge or information sufficient to form a belief whether the plaintiffs are "the owners of the note," and "are justly entitled to have and demand payment of the same."

If this were the whole answer, it would be clearly frivolous, as the uncontroverted allegations show possession and property in the plaintiffs.

If Phineas Freeman had been sued alone, and this had been the whole answer, the plaintiffs would be entitled to judgment on it as frivolous.

But as Rockwell was made a party, and had a right to appear, and has appeared, I do not see how the court can avoid giving him his costs of the action. But I do not think he should

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have any costs of this motion. The answer was one which could not properly be interposed.

The order to amend the complaint, and strike out parts of the answer, may be entered, directing the plaintiff to pay Rockwell's costs of the action, but without costs of this motion to either party.

JAY v. MARTINE.

An execution upon a judgment cannot be issued upon the application of the executors of a deceased plaintiff.

Sections 283, 284 of the Code, are only applicable when the parties to the judgment are living.

The proper remedy for enforcing a judgment, by the personal representative or assignee of a deceased plaintiff, is by action under § 428 of the Code.

(June Special Term, 1858.)

BOSWORTH, J.—The plaintiff recovered judgment in this action, on the 18th of February, 1840, for \$293.53.

On an affidavit of his subsequent death, and that no part of the judgment has been paid, his executors, on notice to the defendant, moved for an order that execution issue on the judgment. Can leave to issue execution, in such a case, be granted on motion? I think not, but that the executors must bring an action, praying the same relief as was formerly granted in a proceeding by *scire facias*.

Prior to the Code, if an execution was not issued within two years after judgment rendered, a plaintiff was obliged to resort to a *scire facias* to obtain execution, although the plaintiff and defendant were both living (2 R. S. 576, § 1).

This necessity is obviated by §§ 283 and 284 of the Code. Those sections, I understand to be applicable to those judgments only, to which the parties are all living. In all such cases, an execution will be allowed to be issued on motion.

In the matter of Walker.

Prior to the Code, if a plaintiff or defendant in a judgment died, before execution issued, none could issue until it was revived by *scire facias*, in favor of, or against the representatives of the decedent. An execution cannot be issued in favor of or against a dead man. It cannot issue in favor of the representatives of a deceased plaintiff, until there is a judgment to authorize and support it.

Their title to the judgment, and to enforce it, is to be established, not by motion, but in an action, under chap. 2, title 13, of the Code, § 428.

If §§ 283 and 284 are restricted to the parties to the record, there is not much opportunity for abuse, even though leave be sometimes granted on publishing a notice. The right of the party moving to be paid the amount of the recovery, and the liability of the defendant to pay it, are established by record evidence. The only debatable question that can arise is, whether it has been paid in whole or in part?

After the death of a plaintiff in a judgment, it is an open question,—who owns it? who has succeeded to his rights? The question of title, as well as other questions that may arise in such a case, are not to be determined in a proceeding by *scire facias*, but by an action, seeking the same relief that was formerly obtained by *scire facias*.

An assignee of a judgment, if the plaintiff was dead, could bring a *scire facias* in his own name (*Murphy v. Cochran*, 1 Hill, 339). He can undoubtedly now maintain an action to obtain judgment, that he have execution of the original judgment (Vide *Cameron v. McKay*, 6 How. P. 372.)

The motion is denied, but without costs.

In the matter of WALKER, an imprisoned debtor.

A petition for the discharge of a debtor, imprisoned under an execution, cannot be heard by a judge at chambers. It must be presented to the court at a regular special term.

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It cannot be heard, in the first instance, at a general term: the court at general term exercising only an appellate jurisdiction, with the exception of the cases specified in § 265 of the Code.

(Before OAKLEY, Ch. J., DUNE and CAMPBELL, J.J.)

At a General Term for hearing appeals from orders, July 29, 1853.

THIS was a petition by a debtor, to be discharged from his imprisonment, under the provisions of art. vi., tit. 1, chap. 5, of the 2d part of the Revised Statutes. The petition had been presented to the chief justice at chambers, who had refused to entertain it.

The judges were all of opinion, that the judge at chambers had no jurisdiction, and that the words of the statute, and especially of §§ 6 and 9 (2 R. S. 2d ed. p. 690), could only be satisfied by holding, that the application must be made to the court at a regular term. They were also of opinion, and so decided, that the petition must, in the first instance, be presented at a regular special term, it being the plain intention of the Code that the court, at general term, should exercise only an appellate jurisdiction, and this being also the construction which the court had uniformly given to its own rules (Rules of 1853, rule 2). The only exceptions were those created by § 265 of the Code, as last amended.

— — —, for petitioner.

C. P. Kirkland, for the creditors.

 GRIFFIN v. DOMINGUEZ.

A foreign consul cannot be examined as a judgment debtor, under the provisions of the Code; and if an order for his examination has been obtained, and served, he cannot be attached for his refusal to obey it.

The objection to the jurisdiction of a state court is fatal, in whatever stage of the proceedings it is raised.

At Chambers, August 2, 1853.

AN execution against the defendant, upon a judgment obtained against him by default, having been returned unsatisfied, an order was made and duly served, for his examination, under the Code. He did not appear on the day appointed by the order, and a motion was now made, upon the proper affidavit, that an attachment be issued against him. It was objected, that the defendant was a foreign consul, and had been duly recognised as such by the general government; and, as these facts were admitted, it was insisted that the court had no jurisdiction.

J. Loder, for plaintiff, contended—

1. That the defendant, having allowed judgment to be entered against him, without setting up his privilege as consul, had finally waived it, and could not be permitted to avail himself of it in any subsequent proceeding founded upon the judgment. He relied upon the cases of *Davis v. Packard* (6 Wend. 327); *Flynn v. Stoughton* (5 Barb. S. C. R. 115); and *Koppel v. Heinrichs* (1 Barb. 449).

2. That the privilege of a consul is strictly personal, and differs from that of a minister or ambassador (1 Kent's Com. 44; Wheaton's Internat. Law, p. 293).

M. C. Betts, contra, quoted 1 Sandford's Sup. C. R. 690; 7 Peters, 276; 3 Code R. 143; Whittaker's Practice, p. 60.

DUER, J.—The cases of *Koppel v. Heinrichs*, and *Flynn v. Stoughton*, are overruled by a recent decision of the Court of Appeals. In the case to which I refer, *Valarino v. Thompson*, the suit was originally commenced in this court, and the defendant, Thompson, appeared, and, not denying jurisdiction, pleaded the general issue, with notice of a set-off. The cause was tried upon its merits, and the plaintiff obtained a verdict, upon which, after the argument of a bill of exceptions, judgment was rendered in his favor. The defendant then brought a writ of error to the Supreme Court, and assigned, as an error in fact, that, at the time of the commencement of the suit, he was consul of the Republic of Ecuador; and the fact being

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established, the Supreme Court, upon this ground, reversed the judgment.

In April last, the Court of Appeals affirmed the judgment of the Supreme Court, holding, that the exemption of a consul from suit in the state courts is not his personal privilege, nor even that of the government by which he is appointed ; but that, under the Constitution, and the Judiciary Act of Congress, it belongs exclusively to the United States ; and cannot, therefore, be waived by any act or default of the consul himself.

It follows, necessarily, from this decision, that it is the duty of a state court, whenever the fact that a defendant in a suit is a foreign consul is brought to its knowledge, to confess at once its want of jurisdiction, and declare its proceedings to be void. Where the jurisdiction of a court depends upon extrinsic facts, unless the facts, destroying its jurisdiction, appear upon the record, as a general rule, the judgment upon that ground can never be impeached ; and, in such cases, it may be truly said, that the court acquires jurisdiction by the submission of the parties : but where the exercise of the jurisdiction is a violation of law, and cannot be justified by the submission or consent of the parties, all the proceedings, as *coram non judio*, are wholly void.

Even if the cases in the Supreme Court, which have been relied on, had still the force of authority, I should not have held that the defendant was precluded from setting up his privilege as a bar to the present application. An order for the examination of a judgment debtor is not a mere process to enforce the execution of the judgment. It is not founded upon the judgment alone, but upon the averment of new facts, which the plaintiff must prove, to entitle him to the relief that is sought. As a substitute for a creditor's bill, it is, in its nature, a new suit, and, as such, is directly embraced by the Act of Congress, which gives the exclusive jurisdiction to the courts of the United States. It was held by this court, in the matter of *Aycenina* (1 Sand. S. C. R. p. 690), that an attachment against a non-resident debtor, as seeking the recovery of a debt from a consul, through the coercion of a state tribunal, was a suit within the meaning of the Constitution and of the Act of

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Congress, and the reason of the decision plainly embraces the present case.

The motion for an attachment is denied, and the order for the examination of the defendant discharged.

OAKLEY, Ch. J., concurred.

REUBEN PARSONS, Appellant, v. JOHN TRAVIS, the Mayor,
Aldermen, and Commonalty of the City of New York, and
SMITH D. BELLOWE, Respondents.

Where an appellant from the special to the general term deposits a sum of money instead of giving an undertaking, and appeals from the general term to the Court of Appeals, giving the proper undertaking, with sureties, the money so deposited must remain in court until a final determination in the Court of Appeals.

(Special Term. Before BOSWORTH, J.)
September, 1858.

A judgment was rendered in favor of the defendants for their costs of this action, which was duly docketed. The plaintiff appealed to the general term, and deposited with the clerk \$250 in lieu of giving the undertaking prescribed by the Code. The judgment having been affirmed at general term, the plaintiff appealed to the Court of Appeals, and gave an undertaking which stayed all proceedings in this court, pending the appeal, on the judgment appealed from. The sureties not having been excepted to, he now moved for an order directing the clerk of the court to pay to the plaintiff the \$250 deposited on appealing from the judgment of the special term to the general term of this court.

J. Graham, for the appellant, made and argued the following points.

I. It has been held in Virginia, that the lien of a judgment,

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and the right to an elegit upon the judgment, are co-existent; that the one cannot exist without the other. (*The Bank of the U. S. v. Winston*, 2 Brockenbrough's R. 252.) The ground is, that the lien of a judgment is created by statute, and falls or fails with the right to enforce it. An elegit is analogous to a *fi. fa.* in this state.

II. Previous to the Code, bail in error was a supersedeas of execution. (Graham Prac., 2d ed. 951.) This relates to personal property.

III. The undertaking in this case, on the appeal to the Court of Appeals, covers all matters included in such an undertaking as would have to be given on an appeal from a special to a general term of this court. The condition is that the appellant will pay the amount directed to be paid by the judgment, *i. e.* the judgment appealed from, or the part, &c., &c. (Code, § 335.) It must be that this undertaking, which can be objected or excepted to, § 341 (as regards sufficiency, &c.), by the respondents in the appeal, was intended to have this effect. The very stay which it works operates to discharge the sureties in any previous undertaking from liability. Are they to remain liable too, and until the determination of the second appeal? If the previous undertaking, if one had been given, would have been discharged, or merged in the undertaking in the Court of Appeals, by parity of reason, the money deposited in lieu of the former can be drawn out of court. There is no reason why it should be held.

IV. If the motion is not granted, there should be no costs on the application. It involves an important point, as yet unsettled.

R. J. Dillon, for defendants, insisted that the motion ought not to be granted, upon the following grounds.

I. The money stands in the place of the undertaking. If the appellant would not have been entitled to a cancelment of the undertaking he cannot be entitled to the money.

II. The undertaking is not satisfied or discharged by the appeal. The condition has not yet been performed.

III. The sureties are not discharged by the appeal. The

staying proceedings being granted not by the consent of the parties, but by operation of law.

IV. It was intended that the respondent should have a double security, one on each appeal. There is no precedent to show that the latter appeal cancels the bonds on the former. And costs should be granted because it is not a new point of practice, but one which, from the absence of authority, was never considered to be tenable.

J. Graham, in reply.

I. In relation to the respondent's first point, the law cancels the undertaking referred to. That is the effect of the undertaking on appeal. It merges the former.

II. In relation to the respondent's second point, the condition of the undertaking is incorporated into the undertaking on appeal. The respondents can lose nothing by being confined to the undertaking on appealing to the Court of Appeals. They have the right to see that it is sufficient. They can except to the sufficiency of the sureties. The idea of the law accumulating securities for the same thing, as the appeals multiply, is preposterous. If the previous undertaking was not discharged, if it remained in force, an undertaking securing the costs of the appeal would be sufficient. The maxim, *Nihil est licitum quod est contra rationem*, applies. The respondents' position is unreasonable.

III. It makes no difference how the time of the principal is enlarged, the sureties are discharged. They do not contract in view of an appeal. It is for this reason the law requires the insertion of their liability in the undertaking on the appeal from the judgment for which they would otherwise be bound.

IV. To say that it was intended the respondents should have a double security, is assuming the whole matter in dispute. Why this intention? What reason is there for it? It is true no authority can be found directly sustaining the application. Such a case has not arisen before. If it has, the adversaries of the party depositing the money in court must have consented to its withdrawal, and not exhibited the illiberality which the respondent's counsel have manifested in this case in not ex-

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tending a similar consent to the appellant. Costs ought not to be allowed, if the application is denied. The meagreness of the respondent's reply proves that the point involved in it is enveloped in doubt.

BOSWORTH, J.—Perfecting an appeal from a judgment at special term to the general term, or from a judgment of affirmance by the general term to the Court of Appeals, by giving such an undertaking as stays all further proceedings in the court below, upon the judgment appealed from, neither divests the lien of either of the judgments appealed from, nor discharges the sureties on the appeal first taken from the special to the general term.

Section 8 of 2 R. S. 359, prescribing the duration of liens by judgment, expressly provides that the time during which the party recovering a judgment shall be restrained from proceeding thereon by the operation of any writ of error, shall not constitute any part of the ten years, which is made the limit of the lien, as against purchasers in good faith, and subsequent encumbrancers. Section 6 makes the lien absolute and unlimited as against the judgment debtor. Section 7 limits it to ten years as against a certain class of persons, but even as against these, section 8 continues it beyond the ten years for such term of time as the plaintiff in the judgment shall be restrained from proceeding on it by the operation of a writ of error. This section, in effect, not only declares that an appeal, which operates as a stay, shall not divest the lien of the judgment, but shall not abridge its duration as against *bond fide* purchasers and subsequent encumbrancers, but on the contrary shall extend it as against them, for an additional period coexistent with the time that proceedings upon it are thus suspended.

It was because such was the law in this State, that § 282 of the Code provided a way in which a suspension of a lien by judgment might be effected "during the pendency of the appeal as against purchasers and mortgagees in good faith." But even this section does not confer power to suspend the lien as against the judgment debtor, and perhaps not as against subsequent encumbrancers by judgment.

The objection, that the sureties in the undertaking are dis-

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charged, by the extension of time procured by the principal by means of the stay, is untenable. It is not an extension obtained by an arrangement between the judgment debtor and the plaintiff, and by the consent of the latter. The extension is given by law, and against the will of the plaintiff. The principle contended for has no application to this case. The debtor has deposited his own money; no question arises as to the rights or liabilities of sureties; but the only questions presented affect solely the rights and liabilities of the judgment debtor.

A judgment of a court of record is not merged by the recovery of a subsequent judgment in an action upon the first, either in the same or in a different court. (*Mumford v. Stocker*, 1 Cow. 178.) Nothing but actual satisfaction will cancel the first judgment, or divest its lien.

The judgment of the Court of Appeals, if one of affirmance, like that of the general term, will have no other effect than to affirm the judgment, which, the money now applied for, was deposited to pay, in that contingency. The defendants have a right to resort to the sum deposited, in the event of an affirmance by the Court of Appeals, and the motion must be denied.

Approved on consultation.

**DAVIS & PALMER v. The MAYOR, &c., of the City of New York,
JACOB SHARPE and others.**

When the act of a municipal corporation, against which relief is sought, affects injuriously the whole community over which the corporate jurisdiction extends, the attorney-general is a necessary party to the prosecution of the suit.

It is only when the corporate act which is a public wrong works also a special injury to particular individuals, that the action can be maintained in their names alone.

Where the presence of other parties than those mentioned in the complaint is necessary to the complete determination of a controversy, the language of the Code, § 122, is imperative; they must be brought in.

A judgment in an action, in which the attorney-general is a prosecuting party, binds the public which he represents, and is a bar to an action by individuals for the same cause; consequently, his presence is necessary to "the complete de-

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termination of the controversy," when the corporate act which is sought to be restrained or annulled is a public injury.

(Special Term. Before DUEK, J.)

October, 1858.

THE original complaint in this action, which was brought to restrain the corporation from making a grant of a railroad to be laid in Broadway, is set forth at large in the report of the proceedings on an attachment against the members of the Common Council. (1 Duer, p. 450, 464.) It was subsequently amended by making Jacob Sharpe and his associates—the grantees of the corporation—parties defendants.

The cause was tried upon the amended pleadings before Mr. Justice DUEK, in June, 1858; the examination of witnesses, and the arguments of counsel, occupying the whole of that special term. The judge, in July, directed the question, whether the presence of the attorney-general, as a prosecuting party, was not necessary, to be re-argued. It was re-argued accordingly at the beginning of this term by Mr. Van Buren for the plaintiffs, and Mr. Flanagan for the defendants, and now, October 28, after stating at length the proceedings that had taken place before him, the judge said, that he was prepared, and should proceed to announce his decision on the question, which he had directed to be re-argued—namely, whether the action could be maintained by the plaintiffs alone, without the aid of the attorney-general as a prosecuting party, should the court be of opinion that the evidence was not sufficient to prove that the contemplated road would be a public nuisance, from which the plaintiffs, as owners of property on Broadway, or otherwise, would sustain a special injury. The objection, that the attorney-general was a necessary party, was first and very distinctly raised, on the argument of the motion for an attachment; and the only reply then given to it, was, that the complaint alleged, not only that the railroad, if established, would be a public nuisance, but that, as such, it would work a special injury to the plaintiffs. The reply was deemed satisfactory by himself, and by the judges who then assisted him; but Mr. Justice Bosworth, in the advisory opinion, which he then gave, plainly intimated his conviction that it was only upon the ground of a public nuisance, producing a special injury, that the plaintiffs

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could be entitled, as individuals, to maintain the action. He (Judge Duer) had not then deemed it necessary to express any opinion upon the question, nor was he then satisfied in his own mind as to the course it might be proper to pursue; indeed, he was, at that time, inclined to think that, setting aside wholly the charges of a public and private nuisance, there were other grounds, stated in the complaint, upon which the plaintiffs, as tax-payers, whose private interests, as such, would be affected by the wrongful acts imputed to the defendants, might justly, and in their own names, demand the relief which they claimed. If the charge of a breach of trust should be proved, it then seemed to him, that the plaintiffs, as *cestuis que trust*, would be entitled to relief. Had he been satisfied by the evidence given on the trial before him, that the contemplated railroad would be a nuisance, specially injurious to the plaintiffs, without examining any other question in the cause, he would not have hesitated, upon that ground alone, to have decreed a perpetual injunction; but as the evidence, from the conflict in the testimony of witnesses, having equal claims upon his belief, had failed to produce that full conviction upon his mind, which could alone have justified him in making such a decree, he had found it necessary to consider whether the attorney-general, as had been intimated by Judge Bosworth, was not a necessary party to the further prosecution of the suit—in other words, whether, without his intervention or presence, a *final* judgment could rightfully be pronounced. As this question had not, in his opinion, been fully argued, and he had found it, upon consideration, far more doubtful than he had originally supposed, he had directed it to be re-argued, and since the argument, with an anxious desire to arrive at a satisfactory result, had examined it with all the care and attention of which he was capable.

It had been said, however, that in the present stage of the cause, he had no right to consider the question at all; that the objection from the want of parties was now too late, and whatever judgment might be given, could never be alleged to impeach its validity. He thought otherwise. In his opinion it was not merely his right, but his duty to consider the question. It was true that under the provisions of the Code, the objection of the want of parties, if not taken by demurrer or answer—

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and it was not so taken in the proceedings before him—was deemed to be waived. (Code, § 98, 144, 147, 148.) But there were many cases in which the defect of parties, although not insisted on by the defendant, could not justly be disregarded by the court, and it was to meet such cases that the Code provided (§ 122) that “where a complete determination of the controversy cannot be had without the presence of other parties, the court *must* cause them to be brought in.” If, therefore, in his judgment, there could not be a complete determination of the present controversy, without the intervention of the attorney-general—as a judge, he had no discretion. The Code imposed a positive duty. He *must* cause the attorney-general to be brought in.

If the determination of the question, whether the attorney-general was a necessary party, rested only on the decisions in England, it seemed to him that it was free from difficulty. In all the cases in the English books, in which the act of a municipal corporation is sought to be restrained, or annulled, as a violation of its charter, a breach of trust, or an excess of power, the attorney-general is found to be a party, either prosecuting alone, or in conjunction with, or upon the relation of, individual corporators. He had not been referred to, nor had he been able to discover, a single case that could be construed as an exception; not a single case, in which such an action, resting alone upon the grounds he had stated, had been prosecuted by individuals, in their own right and in their own name. If, therefore, the existing and uniform practice in England was to be received as evidence of a legal necessity, he saw no escape from the conclusion, that from the nature of the present controversy, the presence of the attorney-general was necessary to its complete determination. He had, indeed, doubted, for a time, whether the English decisions could be relied on as applicable. The powers of the attorney-general in England were derived from the common law, and he was unwilling to say that any such powers belonged to the attorney-general of this state; he was unwilling to say that the latter possessed any powers beyond those which either expressly, or by a necessary implication, are given to him by statute. But an examination of the revised statute, which defines the powers and duties of the

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attorney-general, had removed the difficulty. By the rule of the common law, the attorney-general is a necessary party in all suits in which the crown is interested, and by the first section of our statute (1 R. S. 179) it is made the duty of the attorney-general to "prosecute and defend all actions, in the event of which the people of the state shall be interested," in other words, in all such actions, he is made a necessary party. In England, a corporate act affecting injuriously a whole community, is deemed a *public* wrong, which, as such, the sovereign is bound to redress, and it is for this reason that in all suits in which this redress is sought, the crown is held to be interested. The doctrine and the reasoning, it seemed to him, were just as applicable here, where fortunately the sovereignty resides, not in an individual, but in the people; nor could he doubt that the people, as the sovereign power, ought to be considered as interested in the event of every suit in which the illegal act, which is sought to be restrained or annulled, may, from its nature, be justly treated as a public wrong. The English decisions, therefore, in his opinion, were not only proper to be consulted, but, unless it could be shown that they had been contradicted and overruled in our own courts, he held himself bound to follow them.

The judge then remarked, that the English cases went much further than he had before stated; they not merely proved that it was an invariable usage to make the attorney-general a party in suits like the present, but the grounds of the usage were explained; and he was expressly held to be a necessary party. He felt that the examination which he had given to these cases justified him in saying, that the general rule to be extracted from them was this—that when the act of a municipal corporation, which is the subject of complaint, affects injuriously the public at large—that is, the entire community over which the corporate jurisdiction extends—the attorney-general is a necessary party to the prosecution of the suit; and that it is only where the act, which, in this sense, is a public injury, is also productive of a special injury to particular individuals, that the action can be maintained in their names. If this was the true rule, it was manifest, and had not been denied, that it bore with a decisive application on the case before him, since, reject-

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ing the charge of a special injury, resulting from a public nuisance, the grounds upon which the grant of the railroad was impeached—namely, excess of power, and breach of trust, were those, which every inhabitant of the city, and certainly every tax-paying inhabitant, had the same right to make the foundation of a suit as the actual plaintiffs. Setting aside the nuisance, if the grant, upon the grounds alleged, was illegal and void, the making it was a public injury, affecting not the plaintiffs alone, nor specially, but the entire community of which they are members. For the purpose of showing that he was not mistaken in the import of the decisions, and that the rule which he had stated was constantly applied when a breach of trust in the misapplication of corporate property was charged, he would refer to a few of the cases which it had been his duty to examine.

The judge then cited and commented upon the cases below : *The Attorney-General v. Forbes*, 2 Mylne & Craig, 129 ; *Same v. Aspinwall*, 1 Keene, 153 S. C. ; 2 Mylne & Craig, 613 ; *Same v. Corporation of Poole*, 2 Keene, 190 ; S. C. 4 ; M. & C. 17 ; *Same v. Wilson*, 9 Simons, 30, in which the Vice-Chancellor said, “ where the object is to restrain the application of corporate property to any other than the public purposes to which it ought to be applied, the attorney-general is a necessary party.” (*Attorney-General v. Corporation of Liverpool*, 1 M. & C. 171 ; *Same v. Corporation of Norwich*, 16 Sim. 228 ; *Same v. Corporation of Litchfield*, 13 Simons, 547 ; *Same v. Mayor of Dublin*, 2 Bligh N. R. 312 ; *Spencer v. London and Birmingham R. R. Co.*, 8 Simons, 193 ; and *Sampson v. Smith*, 8 Simons, 373.)

When he had finished this review of the cases, the judge proceeded to say that the rule, which they plainly declared, or necessarily implied, was not to be regarded as technical and arbitrary. It had a solid foundation of principle, and was sustained by very sound reasons of public policy. The object of the rule was to protect a corporation against a multiplicity of suits, and to secure, in that which is commenced, a final determination of all the controverted questions which it involved. When the suit is brought by the attorney-general, no other, involving the same questions, can be instituted ; and when a judgment is pronounced in such a suit, as the attorney-general

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represents the public—the public, that is, all persons, are bound by the decision. (*Sampson v. Smith*, 8 Sim. 273.) But if individuals could maintain a suit for a general and public wrong, as many separate suits might be brought as there were members of the community, whose interests were affected; the pendency of one such suit would be no bar to the commencement of another, and the judgment pronounced would bind not the public, but the parties only. This was illustrated by what had in fact occurred. Three suits in relation to the Broadway railroad, two in the Superior and one in the Supreme Court, involving all nearly the same questions, had already been brought, and were now pending. It was to be remembered that it was not upon the metaphysical being, termed a corporation, nor upon the persons, by whom, for the time, the corporate powers might be exercised, that the heavy multiplied expenses of needless litigation would be certain to fall. They would be borne, in the result, by the corporators themselves, the whole body of citizens, and would form a positive addition to their public burdens. Every inhabitant of the city liable to be taxed, had, therefore, a personal interest in the establishment and strict observance of a rule by which useless litigation would not merely be checked, but effectually prevented. It, therefore, seemed to him that the rule which he had deduced from the English cases, was in itself wise and salutary, and he must therefore hold that he was bound to follow it, unless it could be shown that in our courts it had, not merely been casually overlooked, but distinctly and deliberately rejected. The only case to which he had been referred, that with any semblance of reason could be represented as sanctioning an opposite doctrine, was the decision of the Supreme Court in the case of *Christopher v. The Mayor of New York* (13 Barb. 369). This was a recent and solitary decision, and with the utmost respect for the court in which it was pronounced, he could not regard it as an authority by which he ought to be controlled. It was evident upon the face of the report that the question whether the attorney-general was a necessary party, was by no means fully discussed or considered; nor indeed were the reasons for requiring his presence adverted to at all. The learned judge who delivered the opinion of the court, referred only to two cases as sustaining his own views

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(*Bromley v. Smith*, Sim. 8; *Gray v. Chaplin*, 2 Simon and Stewart, 267). It was to be observed, however, that in neither of these cases were the defendants a municipal corporation; that in the second, the question whether the attorney-general was a necessary party was not raised at all, and in the first, was decided upon grounds which render it certain that, had the defendants been a corporation, his presence would have been required. He could not say, therefore, that this decision had altered or weakened his own deliberate conviction, that the attorney-general was a necessary party to the further prosecution of the suit before him—so necessary that without his presence the controversy could not be “completely determined.”

He should therefore allow ten days to the plaintiffs to make their election whether they would bring in the attorney-general as a prosecuting party, or have an issue ordered for the determination by a jury of the question of public nuisance and special injury.

The plaintiffs elected to bring in the attorney-general.*

LIENAN v. LINCOLN and another.

A general allegation in a complaint, that the defendant had received money, or property, to the use of the plaintiff, or of the assignor of the plaintiff, is bad upon demurrer.

Whether the money or property was so received as to render the defendant liable, is a question of law, and all the material facts necessary to present, and enable the court to determine the question, as facts constituting the cause of action, must be stated in the complaint.

(Before BOSWORTH, J.)

October Special Term, 1853.

THE plaintiff brought this action to recover a claim, or demand, which E. Zachrisson had against the defendants, and which had been sold and assigned to the plaintiffs. The com-

* This decision was in effect affirmed at the same term in January, 1854.

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plaint states that the defendants, "on the 28th of February, 1852, were justly indebted to Zachrisson in the sum of \$7946.36, with interest thereon, for moneys, notes, and effects, before that time had and received, to and for the use of the said Zachrisson, the particulars of which will appear on reference to the annexed account, which is true, and forms part of this complaint." That being so indebted, they became liable to pay it to Zachrisson, or his assigns, when thereunto requested, and being so liable, they did, as plaintiff is informed and believes, promise to pay it to him.

It avers a sale and assignment of the debt, to the plaintiff, in trust, and that he has a right, as owner, to the debt or demand, and prays judgment for the amount of it. The account annexed to the complaint, is in the form of debtor and creditor. As a specimen of its items, one is given, reading thus :

"September 11, 1851.—To notes received from
 Mercantile Insurance Company, for the loss
 of steamer 'Union' \$10,164.24."

The defendants demur to the complaint, and specify, as a ground of demurrer, that the complaint does not state facts sufficient to constitute a cause of action.

F. H. Clarke, for defendant.

E. H. Owen, for plaintiff.

BOSWORTH, J.—The complaint is clearly bad. It does not contain "a plain and concise statement of the facts constituting a cause of action." The Code requires a complaint to contain them (§ 142). The rules by which the sufficiency of a pleading is to be determined, are those prescribed by the Code (§ 140). A stranger to this transaction can learn nothing of its precise nature or character, from the complaint.

Because a defendant receives notes and effects to a plaintiff's use, he does not, as a matter of course, become liable to pay him the amount of them. Whether he has incurred such a liability, may depend upon a variety of facts; upon the pur-

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pose or object for which he received them ; whether he undertook to convert the effects into money, and to collect the notes ; whether he has made himself liable for not collecting or converting ; whether he has disposed of them on his own account, or some of many other facts which readily occur to the mind.

Whether a defendant has received money or property to the use of another, is usually a question of law, depending upon facts which are to be litigated, and found by the court or a jury. Each of the material facts, essential to raise and uphold such a conclusion of law, is a fact which should be stated in the complaint ; and the whole of such facts constitute the cause of action. If enough are not stated, to raise and uphold such a legal conclusion, enough are not stated to constitute a cause of action, and the complaint is demurrable for that cause.

What the facts are, on which the plaintiff will insist, that, in judgment of law, certain moneys, notes, and effects were received by the defendants, to and for the use of Zachrisson, the complaint does not state. Nor does it state the facts, which are relied upon, as sufficient to create a legal liability of the defendants, to pay to him, in money, the amount of any notes they may have received to his use. It does not allege that they are due, have been paid, or misappropriated, or that the defendant has failed or refused to apply them to the purpose for which they were received, or to deliver them to the plaintiff. If the defendant is liable to pay the amount of any notes he may have received for the plaintiff, it is by reason of facts, beyond that of so receiving them. If such facts exist, they are not stated. The facts which, in judgment of law, create such an indebtedness or liability, should be stated in the complaint.

In this complaint, no facts are stated. It simply affirms a legal conclusion, without a statement of the facts on which it is founded. The account annexed to the complaint, obscures, instead of making the real grounds of the claim apparent.

The defendant is entitled to judgment on the demurrer (*Getty v. Hudson Railroad Company*, 8 How. P. R. 177).

But the plaintiff may amend his complaint in twenty days, on payment of the costs of the demurrer.

Approved, on consultation.

LAWRENCE v. WRIGHT.

In an action, under the Code, to recover the possession of real estate, the facts set forth in the complaint must show that the plaintiff has a legal title to the premises in question; the mere averment that he has such a title is insufficient. Facts, constituting a cause of action, or a defence, in the sense of the Code, are physical facts, capable of being established by oral or documentary proof, not propositions, which are true in law.

Special Term, October, 1853.

THIS was an action to recover the possession of certain lots of land, in the city of New York.

The complaint averred, that the lots which it described, were, on or about the 15th of January, 1853, conveyed by Francis Price to the plaintiff, by a warranty deed. That by virtue of this conveyance, the plaintiff was seized of the premises, had a lawful title thereto, and was entitled to the possession thereof, and that the defendant was in the possession, and unlawfully withheld the same from the plaintiff, and upon these grounds demanded judgment.

The defendant demurred, and assigned the following causes of demurrer.

1. That the complaint did not show any right, title, or interest in Price, or any right in him to convey.
2. That it did not allege, that either Price or the plaintiff was ever in possession of the property claimed.
3. That it did not state facts sufficient to constitute a cause of action.

Stillwell & Swan, for defendant.

J. A. Wagstaff, for plaintiff.

DUER, J.—It is very clear that this demurrer must be allowed. All the facts which the complaint avers, may be true, and yet the plaintiff not have the shadow of a right to the D.—II.

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judgment which he demands. The only facts set forth in the complaint are, that on a certain day, one Price, by a warranty deed, conveyed the lots described to the plaintiff, that the defendant is in the possession of the lots so conveyed, and withholds their possession from the plaintiff. It is, however, quite certain that if, upon the trial of the action, these facts, and these alone, were proved on the part of the plaintiff, no evidence on the part of the defendant would be required. The complaint would be at once dismissed. The facts, therefore, which it avers, do not show even a *prima facie* right to recover.

It is true that the complaint avers that, by virtue of the conveyance from Price, the plaintiff became seized by a *lawful* title of the premises in question, and is entitled to the possession, which the defendant *unlawfully* withholds; but these allegations are not of facts, which, as constituting the cause of action, the Code requires to be set forth, but are merely conclusions of law, which, as they do not follow from the facts previously averred, must be wholly disregarded.

The defendant, in an action to recover the possession of property distrained, *damage feasant*, may aver in his answer, under § 166 of the Code, that he was lawfully possessed of the real property upon which the distress was taken, without setting forth his title; and it is perhaps to be regretted that a like compendious form of pleading has not been authorized in every action, in which an issue upon the title to real property is properly raised; but, as the Code is framed, the exception proves and establishes the general rule. It proves that, in every other action than that to which § 166 relates, a plaintiff or defendant, who relies upon his title to real property, must set it forth in his complaint or answer; that is, must set forth the facts which, if true, prove that the title, which he claims, exists.

I incline strongly to believe that the errors, which too frequently occur in pleadings under the Code, must be ascribed to a mistaken interpretation of the words, "facts constituting a cause of action," or "a defence;" nor is the source of the mistake difficult to be explained. In writing, and in conversation, the term "fact" is frequently, and perhaps not improperly, ap-

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plied to an abstract proposition, a proposition true in morals or in law, but of which the truth depends, not upon testimony, but upon authority or reasoning, and in this sense of the term it is obvious, that every just conclusion of law is a fact. That such a conclusion, however, although just in itself, is not a fact within the meaning of the Code, is evident upon slight reflection, and a single example will be sufficient to prove.

There is no apparent impropriety in saying, "It is a fact, that Peter owes John a sum of money," but who will assert that a complaint would be good that should aver that the defendant owes the plaintiff a certain sum for which the plaintiff demands judgment, without alleging a single fact from which the debt could arise? Yet if the words of the Code, "facts constituting a cause of action," refer to conclusions of law, and not to the facts from which, if admitted or proved, the conclusions are to be drawn, even such a complaint would be free from objection. It is in reality no worse than that now before me, nor than many that almost daily pass under our observation.

All these errors in pleading will be avoided if it is constantly remembered that the facts which the Code requires to be set forth are not true propositions, but physical facts, capable, as such, of being established by evidence, oral or documentary, and from which, when so established, the right to maintain the action, or the validity of a defence, is a necessary conclusion of law—a conclusion which the court will draw, and which it is quite unnecessary that the pleader should state.

Approved upon consultation.

Demurrer allowed, with the usual liberty to the plaintiff to amend the complaint upon payment of costs.

SCHENCK and another v. NAYLOR.

In an action to recover damages for the breach of a covenant, if the complaint does not show, either by express words, or by a necessary implication, that the covenant is broken by the defendant, it is bad upon demurrer.

Schenck v. Naylor.

The defect is not cured by a general allegation, that the acts set forth were "a violation of the defendant's covenant."
(October Special Term, 1858.)

THIS action was brought by the plaintiffs as tenants, against the defendant as landlord, for a breach of a covenant contained in an agreement for the letting of the basement of the premises known as No. 464 Pearl street, New York.

The covenant alleged to be broken, is as follows: "The plaintiffs show, that in said lease it is further agreed on the part of defendant, that the defendant should not let, or allow to be underlet, any other part of the building No. 464 Pearl street, for a restaurant or porter-house."

The breach of the covenant is alleged as follows: "The plaintiffs show that on or about June 1st, 1853, a porter-house was opened on the first floor above the basement, so let by defendant to plaintiffs, which porter-house is still occupied as such to the great damage of plaintiffs, and in violation of defendant's agreement, as above stated."

The defendant demurred to the complaint, as not containing facts sufficient to constitute a cause of action, because the plaintiff had not averred, or shown, that the defendant let, or allowed to be underlet, any part of the building No. 464 Pearl street for a porter-house.

Barnard & Parsons, for the defendant.

I. It is certain that the breach alleged is not in the words of the covenant. It does not appear that the defendant had anything to do with the porter-house which was opened on the 1st of June. He has agreed not to let, or allow to be underlet, any other part of the building No. 464 Pearl street; and if a porter-house is kept there without being allowed by the defendant, he has not broken his covenant.

II. The breach alleged is not tantamount to following the words of the covenant. If a porter-house was opened on the premises, it does not follow that the defendant let, or allowed to be underlet, the premises for that purpose. A porter-house may be there without any privity or consent of the defendant, and to allow the breach alleged to be good, would change the

covenant from its clear terms to a covenant that a porter-house shall not be opened in any other part of the premises, without reference to any act or permission of the defendant.

III. If the plaintiff cannot aver, or prove, that the defendant let, or allowed the premises to be underlet, for a porter-house, they cannot recover in this action, although they may be able to prove that a porter-house was opened there.

IV. The words in the averment of the breach, that said porter-house "is in violation of defendant's agreement," is a conclusion of law from the facts previously stated. If these facts do not amount to a breach, the conclusion is no more correct than to allege that a dry-goods store was kept there "in violation of defendant's agreement."

J. Aitkins, for plaintiffs, *contra*.

I. By the defendant's agreement, as averred, it was understood that no porter-house or restaurant should be kept at any other part of the building. The breach is therefore sufficiently averred.

II. The averment that a porter-house was opened in violation of defendant's agreement, and the fact that it was so opened, requires the defendant to show some defence in mitigation, or otherwise, for the non-fulfilment of the agreement on his part.

III. The defendant here puts himself on his own literal construction of the language of the agreement, and claims to be excused from the fair interpretation or meaning of the agreement. The plaintiffs have no control of any other part of the premises except the part hired by them from defendant, and there is no doubt that the defendant is bound in good faith to fulfil his agreement to the extent claimed by plaintiffs.

DUER, J.—I cannot give that construction to the covenant in the lease which was insisted on by the counsel for the plaintiffs; and giving the proper construction to the covenant, I cannot say that the complaint alleges a breach. The covenant is not general, but is limited to the personal acts of the defendant. It is not, that during the continuance of the lease no restaurant, or porter-house, shall be opened in any other part of the premi-

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ses, but that the defendant will not let, nor allow to be underlet, any part of the premises for such a purpose. The complaint does not allege that either of these acts has been done by him, but merely, that in a certain part of the premises a porter-house has been opened. It is true, the words, "in violation of the defendant's agreement," are added, but these words aver only a conclusion of law, and as the conclusion is not justified by any facts stated in the complaint, the averment is irrelevant and nugatory.

It may not be necessary that the exact words of a covenant should be followed in assigning a breach, but it must distinctly appear, by express words, or by a necessary implication, that, admitting the truth of the facts stated in the complaint, the defendant has broken the covenant in its true sense and meaning. The words of the covenant need not be literally, but must, in all cases, be substantially followed.

If the defendant is the sole owner of the building described in the lease, it is difficult to believe that any part of it can be occupied as a porter-house, unless let by him, or by one of his tenants, for that purpose. Still such may be, and I have no right to say, is not the fact. It may be, that the occupant is a mere intruder and trespasser, or he may have entered, and claim to hold the possession, under a paramount title.

I am therefore forced to say, that as the facts set forth in the complaint do not show, expressly, or by a necessary inference, a breach of the defendant's covenant, they are not sufficient to constitute a cause of action.

Demurrer allowed, with liberty to the plaintiffs to amend upon the usual terms.

Approved upon consultation.

RIGGINS v. WILLIAMS.

Where, under an order upon the plaintiff to file security for costs, an undertaking executed by two sureties is filed, the justification of one of the sureties, upon exceptions, is sufficient.

(October Special Term, 1853.)

Genet v. Dusenbury.

So held by all the judges consulted by DUER, J., and held to apply to all cases when the terms of an order, requiring security to be filed for any purpose, are general.

GEORGE C. GENET and CHARLES H. PAEMLEE, respondents, v.
MARY E. DUSENBURY, appellant.

If a married woman is sued alone, on a contract made by her during coverture, and does not plead the coverture, but allows judgment to pass by default, and subsequently applies, on motion, to the discretion of the court, to set aside the judgment, and execution issued thereon, the court will not interfere, when it appears, in answer to the motion, that she obtained the credit by representing herself to be a widow, and that the plaintiffs had no notice to the contrary, but will leave her to her remedy by appeal, or to other remedies that may exist, for enforcing strictly legal rights.

(Before OAKLEY, Ch. J., DUER, CAMPBELL, and BOSWORTH, J.J.)

November General Term, 1858.

THIS was an action against the defendant, as maker of a promissory note. Judgment *in personam* had been entered against her, for want of an answer, for \$349.87, the amount of the note and interest, with costs of the action.

The defendant moved to set aside the judgment for irregularity, and for other relief, on affidavits, showing that at the time she made the note she was, since has been, and still is, a married woman. The alleged irregularity consists in not having made her husband a party defendant. The motion was denied, and from the order denying it, the defendant appealed to the general term.

The affidavits on which the motion was opposed, showed, among other things, that the note was given for goods sold and delivered to the defendant, on the representation that she was a widow woman; that she was worthy of credit; that she had up a sign with her name upon it, and made many of her purchases and transacted portions of her business by one I. T. Munson, as her agent.

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Sealey and Cheney, for defendant.

C. P. Kirkland, for plaintiffs.

By THE COURT. BOSWORTH, J.—In *King v. Jones* (2 Lord Raym. 1525), it was said, that if an action against a *feme covert* be prosecuted against her alone to judgment, it is error, for which it may be reversed on writ of error brought by the husband. In *Milner et al. v. Milnes et al.* (3 Term R. 627), the Court of King's Bench assented to the correctness of this position.

But it is said that, unless he brings error, the judgment will stand good, for the wife alone cannot bring error (Bro. Abr. Tit. Error, fol. 173, and Tit. Joinder in Action, fol. 88).

Such a case was expressly provided for by the Revised Statutes (2 R. S. 592, § 5).

It is undoubtedly true, that a *feme covert* cannot regularly be sued as a *feme sole*: her contracts made during coverture create no personal obligation on which a judgment *in personam* can be recovered against her (*Hookham v. Chambers*, 3 Bro. and Bing. 92; *Marshall v. Rutton*, 8 T. R. 546; 2 Kent's Com. 161).

Although this be so, the question is still left, in what way is the nonjoinder of the husband to be made available to the wife, and what are the legal consequences of her suffering judgment to be taken against her by default?

It has been held, that the coverture cannot be pleaded in bar of the action, but only in abatement of it (*Milner v. Milnes*, 8 T. R. 627). That this plea can only be pleaded by her in person (2 Sand. 209, *a.*; Graham's Pr. 229, 2d edit).

That if the fact of coverture be doubtful, the court will not relieve her on motion, summarily, but will leave her to her plea of coverture, in the ordinary course of proceeding (*Partridge v. Clarke*, 5 T. R. 194).

It has also been held, that where a married woman has been sued and arrested as a *feme sole*, the court will not, as a matter of course, discharge her, on motion, on filing common bail, if she obtained the credit pretending she was a single woman, or is sued as an acceptor of a bill of exchange (*Pearson*

v. *Meadon*, W. Bl. R. 904; *Partridge v. Clarke*, *supra*: *Richardson v. Cowlan*, 2 Marsh. 40; *Jones v. Lewis*, 7 Taunt. 55).

The principle of these decisions covers the merits of this motion, so far as it is to be treated as one addressed merely to the discretion of the court.

It appearing, in answer to the motion, that a fraud has been committed in procuring the credit, that the defendant is sued as the maker of a note, the court is not bound to interfere, as a matter of course, in a summary way, to give relief.

The Code has enacted nothing substantially new, by providing that in an action against a married woman, to charge her *in personam*, her husband shall also be a party defendant (Code, § 114; 2 R. S. 597, § 5; *Morse v. Earle & Jackson*, 13 Wend. 271).

The Code provides (§ 144), that the defendant may demur to the complaint, when it shall appear on the face thereof, that there is a defect of parties plaintiff or defendant; that if such matter does not appear on the face of the complaint, the objection may be taken by answer (§ 147); and that, if such objection be taken neither by demurrer nor answer, the defendant shall be deemed to have waived the same (§ 148).

The published abstract of the decisions made by the Court of Appeals, in October, 1853, represents that court to have decided, in *Hastings v. McKinley & Thomas*, that "where an action concerning her separate property is commenced by a married woman in her own name only, if no objection on that account was taken, by answer or demurrer, such objection is waived."

If that rule is equally applicable to a *feme covert* defendant, then the mere objection of the non-joinder of the husband is waived, by omitting to take it by answer.

The only objection that would remain, relates to the merits of the action.

If, as is contended by the defendant's counsel, the judgment is void, she needs no aid from the court. In an action of trespass for taking her property, the plaintiffs cannot protect themselves by the judgment and execution issued thereon, if the judgment is void.

Genet v. Dusenbury.

If not void, but merely erroneous, and the error is one which entitles the defendant to have the judgment reversed, as a matter of strict legal right, then she will have a perfect remedy by appealing from the judgment.

The defendant's counsel supposes, that no appeal can be had from a judgment entered by default, and therefore insists that it is the duty of the court to relieve her upon motion. The case does not require the decision of the question, whether an appeal will lie in such a case. The only substantial question presented by this appeal, is simply this: Is such a defendant, on such a state of facts, entitled to relief, on motion, as a matter of strict legal right?

In addition to the cases cited, in which the court refused, under similar circumstances, to discharge a married woman from arrest, on filing common bail, *Mores v. Richardson* (8 Barn. and Cres. 421) is an authority for the position, that, after judgment by default against a married woman, and her arrest upon *ca. sa.*, the court will not discharge her from custody, as a matter of course, on motion, notwithstanding the fact of her coverture may be incontestable.

In that case, which was decided in 1828, such a motion was denied, and she was left to her remedy by writ of error.

In *Bignon v. Jones* (15 Mes. and Wels. 566), after a judgment had passed against husband and wife, and her body had been taken in execution, the court refused to discharge her from custody, for the reason that she did not swear that she had no separate estate. The reason of discharging a married woman from custody in such cases, is said to be, that her imprisonment will not be continued as a means of coercing payment, inasmuch as, in judgment of law, she is incapable of acquiring property.

But if she has dealt as a *feme sole*, and has obtained credit on the representation of her being a single woman, it is equitable that she should apply her property to pay debts which were contracted under such circumstances. As the justice of the plaintiffs' claim is not controverted, as the most they can effect with their execution is to reach sufficient of her separate property to pay the judgment, they will not acquire any inequitable advantage, and she will not be deprived of any

Bridges v. Miller.

equitable right, if the judgment and execution are allowed to stand. If, as her counsel seems to suppose, an appeal from the judgment will not lie, the only consequence will be, that the plaintiffs will obtain what in equity they are entitled to, if they have levied on sufficient property to satisfy the judgment.

We are of the opinion, that the defendant is not entitled to the relief sought, upon a summary application to the discretion of the court. There are no equitable considerations requiring its interference.

The order appealed from must be affirmed, with costs ; and the defendant must be left to obtain such strictly legal relief as she may be entitled to, by such ordinary proceedings as she may be advised.

BRIDGES and others v. MILLER.

The words, "proceedings to compel the determination of claims to real estate," in § 308 of the Code, refer only to the special proceedings authorized by the revised statutes.

In an action to set aside a conveyance of real estate, an extra allowance can only be made when the case upon the trial appears to be "difficult or extraordinary," or "the prosecution or defence has been unreasonably or unfairly conducted."

(November Special Term, 1858. Before OAKLEY, Ch. J.)

THE complaint was filed to set aside a conveyance of real estate, in the city of New York, upon the grounds of the incompetency of the grantor, and the exercise of undue influence. Upon the coming in of the answer, issues were directed, which were found by the jury in favor of the defendant. Subsequently, at a special term, a new trial was refused, and the complaint finally dismissed. The defendant now moved for an allowance under § 308 of the Code.

OAKLEY, CH. J.—As it does not appear that the judge who tried the issues, deemed the case to be "difficult or extraordinary," and there is no evidence that the prosecution of the suit has been "unreasonably or unfairly conducted," I am satisfied,

Crocker v. Claughly.

that I have no power to make any additional allowance. It is a mistake to suppose that this action is a proceeding to compel the determination of a claim to real property, within the meaning of the Code. The proceedings to which alone § 308 refers, are those specially authorized by the revised statutes (2 R. S. or p. 312), and the provisions in relation to which, although modified in form, the Code, by an express provision, has retained in force (§ 449). The motion is denied without costs.

Approved on consultation.

CROCKER and another v. CLAUGHLY.

The defendant in an action, will be allowed to set off a judgment in his favor for costs, against a judgment upon a verdict, in favor of the plaintiffs, when the latter are shown to be insolvent, notwithstanding they had previously assigned the verdict to their attorney.

(November Special Term, 1853. Before the Chief Justice.)

THE plaintiffs, in an action for the recovery of money, only obtained a verdict for \$35, which they immediately assigned to their attorney. Judgment was subsequently entered and perfected, and was, that the plaintiffs should recover the \$35, and the defendant his costs, amounting to \$65.56. The defendant, upon an affidavit of the facts, and of the insolvency of the plaintiffs, moved that the judgment of the plaintiffs should be satisfied by a set-off of an equal amount of the costs which he had recovered.

The Chief Justice, without passing upon other questions which were raised, held that the insolvency of the plaintiffs was not only a sufficient, but a conclusive reason for granting the motion.

Approved on consultation.

Hubbard v. Guild.

HUBBARD & WILLIS v. GUILD.

When judgment creditors have acquired a lien upon a fund in the hands of a receiver, the court will not, upon their petition, make an order upon the receiver to satisfy the judgment out of the moneys in his hands, until a decree has been made in the action in which the receiver was appointed, and notice has been given to all other creditors interested in the distribution of the fund. But in order to protect the petitioners, an order will be made upon the receiver, forbidding him to make any payments out of the fund without notice to the petitioners, or their attorney, and allowing the petitioners to institute such an action against the receiver and other parties, as they may be advised.

(General Term, December, 1852.)

APPEAL from an order at special term. All the material facts are stated in the opinion of the court.

Evarts, for plaintiffs and appellants.

Dodge, for petitioners.

BY THE COURT. HOFFMAN, J.—This is an appeal from an order made at the special term, declaring that the petitioners, George Gardiner and Joseph P. Gardiner, had acquired a lien for the payment of the judgment stated therein, upon the fund in the hands of the receiver, before his appointment; that such fund came into his hands subject to such lien, and that the receiver satisfy such judgment with interest, out of the assets received, and to be received by him, before payment of any other claims.

In order to understand the grounds of the decision we have made of this case, it will only be necessary to state the following facts:—On the 22d of January, 1852, the petitioners, G. & J. P. Gardiner, named in the order, brought their action in the supreme court of this state, against the two plaintiffs in this suit, Walworth & Nason, with the defendant, Guild, comprising the firm of Walworth, Nason & Guild, and doing business in New York. A judgment appears to have been regularly ob-

Hubbard v. Guild.

tained in that suit on the 21st of April, 1852. On the 2d of July, 1852, the plaintiffs instituted a creditors' suit on that judgment, and an execution thereon returned unsatisfied for a residue. They procured the appointment of a receiver, on the 21st of September, 1852, and no further steps have been taken in that suit.

On the 22d of May, 1852, the present action was commenced. The plaintiffs are Walworth and Nason, residents of Massachusetts, with Hubbard and Willis, their assignees under the proceedings against them as insolvents, taken in that state; the effect of which, as stated in the complaint, has been to vest all the property of Walworth and Nason in them. The defendant, Guild, is the other partner of the firm of Walworth, Nason, and Guild.

The prayer of this complaint is for an account of the assets of the firm, their application to the debts of the firm without preference, an injunction and receiver, and payment to the plaintiffs, Hubbard and Willis, as assignees, of any amount which may appear due to them, as representing Walworth and Nason.

An injunction issued against the defendants the 29th of May, 1852, restraining him from intermeddling with the partnership property in the usual form; and on the 4th of November, 1852, a receiver was appointed, who took possession.

It should also be noticed that a certain amount was collected under the Gardiners' execution, by the sheriff, and that the funds in the hands of the receiver in this action, have resulted chiefly from debts due to the firm; and such is the nature of the assets remaining under his control.

The Gardiners presented their petition to this court, setting forth the above facts, as well as others not now material to be stated, gave notice to the parties in the action, and the receiver; and upon that petition the order appealed from was made.

We do not intend to express an opinion upon the legal rights of the petitioners, on the facts as presented, further than to say, that they are plainly not so untenable as to justify a dismissal of the petition, and vacating the order on the merits. But we are of opinion that in the present state of the proceedings in this suit, and upon this petition, an order for declaring the

priority of the claim, and adjudging payment cannot be made.

Although the applicants have not proceeded in their suit upon the judgment, and obtained the usual order for payment, out of the funds collected by their receiver, yet they are entitled to institute a suit here to reach other equitable assets in other hands. (*Greenwood v. Broadhead*, 8 Barb. S. C. Rep. 596; see also *Sale v. Lawson*, 4 Sand. S. C. Rep. 718.) Supplemental, or further bills to reach other property, which could not be reached by a previous creditor's bill, were of frequent occurrence.

Of course it should be made to appear that the claim was unsatisfied; and it might be that they could not get a decree for actual payment here, until the suit was closed in the supreme court. The completion of the proceedings in the supreme court, would, however, leave the petitioners exactly where they are now, as to the fund under the control of this court. An application must be made here.

If again, the present action had proceeded to a decree, directing accounts to be taken, and all creditors to be called in, in the usual form, the present mode of proceeding might be proper. This was the course pursued in the important case of *Elliot v. The United Insurance Company* (7 Gill's Maryland Reports, 387), a case bearing much upon the question of right here presented, as well as that of form. A petition was there filed, after a decree, in a creditor's suit against the corporation, was answered by the receiver, and the point raised thus settled.

The reason for allowing such proceeding after a decree was obvious. The cause is then no longer under the control of the parties; but what is of more importance, every creditor has an opportunity of being heard, to establish his own demand, and contest that of others. Those who appear are *quasi* parties to the suit, and must have notice of every material proceeding.

But in the present case, even allowing that the receiver may be treated as representing the creditors, and even if, in strictness, a power resides in this court to make the order in this form, we should deem it inexpedient to do so.

The creditors, if fully represented by him, should have the

Hubbard v. Guld.

receiver a formal party to a record, and called upon to set up every justifiable defence to the claim, or to bring superior or equal rights of others before the court. This was done in *Waring v. Robinson*, referred to. The defendant, Miller, the receiver, was united with the partners in a bill to test the validity of a confession of judgment made after his appointment.

We have seen a similar course pursued in the Maryland case, although a petition was there justifiable.

In several cases in which the receivers of the Life and Fire Insurance Company were concerned, as representing the interests of creditors and stockholders, bills were filed against them.

In one case, conducted by the late eminent counsel, Mr. P. A. Jay, commenced before their appointment, he filed a supplementary bill to bring them in. In no case while they were common law receivers, was any demand or claim affecting the property of the company, litigated, by petition, in the suit in which they were appointed. Bills were always brought. After 1830, they became receivers under the revised statutes, upon application of the attorney-general; and then the adjustment of claims was made under the statutory provisions.

The court of chancery does, indeed, sometimes pass upon rights in a summary way, by an examination *pro interesse suo*; but it will be found that in general this is allowed only to settle a right of possession, such as where a mortgage is interfered with by the possession of the receiver, very frequently an ejectment is ordered to be brought or defended (Smith on Receivers).

It is urged by the counsel of the applicants, and there is force in the argument, that they should not be left for the assertion of their rights, to the contingency of a decree being had in this suit, over which they have not the slightest control, and which may be abandoned by the parties, or even the plaintiff, at his will. That the dismissal of the suit would regularly supersede the receiver, and the funds would go among the parties to the record.

We can so far take notice of the petitioners' intervention in this cause, and their rights, as to protect them from this result. The cases of *Langan v. Bowen*, 1 Sch. & Lefroy, 295; *Whit*

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v. *Lord Westmeath*, 2 Molloy, 128, and Beatty Rep. 180; and *Murrough v. French*, 2 Molloy, 497, afford authority enough for restricting a receiver from paying out the funds without the priority of the claimant.

In the above cited cases orders to such an effect were made upon terms of the parties filing bills immediately.

We are of opinion, that the order of the 28th day of October, 1853, made at special term, must be vacated. And that an order be entered, directing the receiver appointed in this cause, not to pay out any moneys in his hands, without notice to the attorney of the petitioners, George Gardiner and Joseph P. Gardiner; that such petitioners have liberty to institute such action against the receiver in this cause as they may be advised, making such other persons parties as they shall see fit; and that neither party be allowed costs as against the other, for the petition, or the proceedings thereupon, or upon this appeal.



INDEX.

ACCORD AND SATISFACTION.

1. When cattle, sold without a warranty, are found, when slaughtered, to have been bruised, and the seller for that reason makes a deduction from the original price, and accepts a less sum in satisfaction, he is bound by the settlement—the equity of the deduction makes it a good accord and satisfaction. *Taylor v. Nussbaum*, 302
2. When the claim of a creditor is disputed in good faith, and to settle the dispute he abates a part of his demand, the settlement, as a compromise, is valid and binding, although he was not legally bound to make the abatement. *id.*
3. One R. K. C. held notes of the defendants, including the three notes in suit, which were payable to his order, amounting to nearly \$3000, and they being unable to pay their creditors, he made a settlement with them, and accepted from them as a payment in full of all the notes so held by him, the note of a third person for \$500, which was paid at maturity. R. K. C. then for a valuable consideration endorsed the notes in suit without recourse to the plaintiff, who at the time of the endorsement had notice of the settlement with the defendants. *Webb v. Goldsmith*, 418
4. Held, that although the note of a third person so received by R. K. C. was for a much less sum than was then owing to him from the defendants, yet its

acceptance by him as a payment in full, rendered the transaction valid as an accord and satisfaction, and that the plaintiff having notice of the facts was bound by the settlement. *id.*

ACTION.

1. No action can be maintained by a father to recover damages for the removal of his infant child so as to prevent the production of the body of the child upon a habeas corpus, when it appears the father had not an absolute right to the custody of the child, and that the child was incapable of rendering any services of value. *Rising v. Dodge*, 42
2. If the conduct of the defendant, in the removal of the child, amounted to a violation of the provisions of the R. Stat. (2 R. S., p. 572) he is liable to be prosecuted for a misdemeanor, but is not liable to a civil action unless special damage is shown. No such action is given by the statute. *id.*
3. F. & Co. sold and delivered to D. 100 boxes of raisins at \$2 per box at 4 months credit for approved paper, and received in payment a bill of exchange drawn and endorsed by D., and accepted by a house in Philadelphia. D. alleging that the raisins were of inferior quality to the sample by which they had been sold, endeavored to rescind the contract, and gave a written notice to F. & Co. that payment of the acceptance would be resisted. The bill at its maturing

- was not presented to the acceptor for payment, and at the expiration of the term of credit, F. & Co. brought their action against D. for the price of the raisins so sold and delivered to him. *Francis v. Del Banco*, 183
4. *Held*, that the action could not be maintained upon the original consideration, the debt created by the sale having been satisfied by the reception in payment of the bill of exchange, and that the question of D.'s liability as drawer and endorser could only be properly raised and determined in an action upon the bill itself. *id.*
5. Section 31 in the title of Ejectment in the R. S. is one of those general provisions relating to actions concerning real property which apply to actions under the Code, according to the subject matter of the action, and without regard to its form (Code, § 455). *Lang v. Wilbraham*, 171
6. The provisions in the section, by their reasonable interpretation, apply to all cases where, from any cause, the title of the plaintiff has ceased to exist before the trial. *id.*
7. It is not necessary to file a supplemental answer to enable a defendant to avail himself of the defence which these provisions furnish. *id.*
8. When an order for the resale of mortgaged premises is made in a foreclosure suit on account of A. B., as the first purchaser, and requiring him to pay any difference in price, no action can be maintained on the order against C. D., on the ground that he was the real purchaser. The order concludes the owners of the fee. *Paine v. Smith*, 298
9. In an action on promissory notes, given for work and labor done, and materials furnished by the plaintiff, in building, altering, and repairing certain buildings belonging to the defendant, it is a good defence, that the plaintiff, before he commenced the action, had commenced proceedings in the Common Pleas, to enforce his lien upon the buildings for the same debt. *Ogden v. Bodle*, 611
10. Such a proceeding is an action, substantially, for the same cause, with the additional remedy that; if the debt is established, the lien will be enforced. *id.*
11. In an action against the owner of a building in the city of New York, to recover a balance, alleged to be due from him upon the contract for the erection of the building, the defendant cannot set up as a bar to a recovery, that mechanics and other persons had taken the necessary preliminary steps for establishing liens upon the building, for labor performed, or materials furnished by them, at the request of the contractor. *Westervelt v. Levy*, 354
12. The defendant, in such a case, should seek relief, either by instituting a cross-action, making all the persons claiming liens parties thereto; or by a special application for liberty to pay into court the amount due from him upon the contract, to abide a final decision upon the claims, and for a stay of proceedings in the meantime. *id.*
13. The mere pending of claims under the lien law, which have not been satisfied nor even established, can be no defence to an action for the recovery of the sum he had expressly covenanted to pay. Judgment for plaintiff affirmed with costs. *id.*
14. In an action to recover a debt contracted by partners, a surviving partner and the personal representative of a deceased partner, cannot be united as defendants. *Higgins v. Rockwell*, 650
15. The surviving partner is alone liable at law, and it is only when the remedies against him are exhausted that relief may be had in equity against the representatives of the deceased partner. *id.*
16. But as the objection to such a joint action appears upon the face of the complaint, it cannot be taken in an answer, but must be raised by a demurrer. *id.*
17. It is not waived, however, by the omission to demur, but as the com-

plaint shows no cause of action against the representative of the deceased partner, it may be taken advantage of upon the trial under § 148 of the Code. *id.*

See ASSESSMENT, 1.

ASSIGNMENT, 1.

EXECUTORS AND ADMINISTRATORS, 1, 2, 6, 7.

MALICIOUS PROSECUTION.

AGENT.

1. When a sum of money paid to an agent is credited by the principal, the credit so given is sufficient proof of the authority of the agent, so as to entitle the person making the payment to prove under what circumstances, and upon what account it was made. *Nesbit v. Stringer & Townsend*, 26

2. The defendants, merchants in New York, signed and delivered to an agent of the plaintiffs, merchants in Liverpool, the following order to be executed by them.

"500 tons Scotch pig iron of the Glengarnock, Summerlee, Govan, Cambro, Calder, Dundyvvan, Coltness, or Gartsherrie brands, to be purchased and shipped immediately at current rates, and bargains made for freight as low as they can make it." *Darby v. Pettie*, 189

3. *Held*, that the order, although not addressed in writing, was rendered valid by its delivery to the agent and its acceptance by him. *id.*

4. *Held* also, that the order was a direction to the plaintiffs to purchase from others as agents, and not evidence of an agreement to purchase from them as owners. *id.*

5. An agent, having a discretionary power to sell goods and collect the price, has an implied authority to make any deduction from the original price that could have been made by his principal. *Taylor v. Nusbaum*, 302

6. An agent of a railroad company stated that the title of his office was superintendent, and that, as such, he had a ge-

neral supervisory control over the whole line of the road, everything connected with the running of the road being under his supervision and control, and that he paid money to drivers, conductors, and other persons employed by him as superintendent, but had no direction over the treasury. *Stephenson v. New York and Harlem Railroad*, 841

7. *Held*, that it was not to be inferred from this description of his powers that he was authorized by his office to arrange and liquidate claims made against the company, for the negligence of its servants in running its trains, or, as agent, to contract with third persons to repair or remedy the consequences of such negligence. *id.*

8. *Held*, therefore, that the superintendent of the road of the defendants, in the case before the court, had no authority to bind them by the employment of a physician or surgeon to attend upon a child, which had been run over by a car, and severely injured. *id.*

AGREEMENT.

1. The owners of the lots on the north side of St. Mark's Place, in the city of New York, agreed by parole that the houses to be erected thereon should be set back 8 feet from the line of the street, so as to have a court-yard of that depth and of the width of the lot in front of each house. The agreement was carried into effect by the erection of a row of dwelling-houses on a line with each other and having each a court-yard in front. *Tallmadge v. East River Bank*, 614

2. *Held*, that the agreement thus executed became binding on the parties and their grantees, so as to render it the duty of a Court of Equity to restrain its violation. *id.*

3. *Held*, that each house thus erected became a servient tenement with respect to the others, to the extent of the space in front, and to that extent each acquired an easement, that unless by the consent of all the owners could not be disturbed. *id.*

4. *Held*, that an injunction restraining the defendants, who by mesne conveyances had become the owners of one of the lots, from building on the space so agreed to be left open, was properly granted. *id.*

See PARTNERSHIP.

AMENDMENT.

1. The judge, upon the trial of a cause, has no right to strike out the only defence made by the answer, and substitute another, which is distinct and inconsistent. *Fagan v. Davison*, 158
2. It rests wholly in the discretion of the judge who tries the cause, whether he will permit a pleading to be amended upon the trial. The general term will not review his decision upon an exception. *Hunt v. Hudson Riv. Fl. In. Company*, 481

ANSWER.

See PRACTICE.

APPEAL.

See PRACTICE.

ASSESSMENT.

1. Assessments, imposed in proceedings, taken under the "Act to reduce several laws relating particularly to the City of New York into one act," passed April 9, 1813, and the acts amending the same, to widen and straighten streets in the City of New York, upon the owner of a lot, on account of the benefit to accrue to such lot, are an actual and first lien upon the lot, and payment of the sum assessed may be enforced in the same manner, as if the lot had been actually mortgaged for the payment thereof. *Mayor of New York, &c., Appellants, v. William Colgate, Respondent*. 1
2. A sale of the lot at auction by the Corporation to collect the sum assessed,

when the proceedings become ineffectual to vest any title in the purchaser, through the mere misjudgment of the officers of the Corporation, is not a bar to an action to recover the assessment, if the owner has not been damaged by the sale, nor disturbed in his possession of the premises. *id.*

3. Such a demand is not barred by the statute of limitations within a shorter period, than a demand arising from an actual mortgage of real estate. *id.*

ASSIGNMENT.

1. A general creditor cannot maintain an action to set aside an assignment as fraudulent and void as against creditors. The rule that such an action can only be brought by a judgment creditor, has not been altered by the Code. *Neustadt v. Joel*, 530
2. An assignment for the benefit of creditors gave an authority to the assignee to sell the property assigned, "upon such terms and conditions as in his judgment may appear best, and most for the interest of the parties concerned." *Schufeldt v. Abernethy*, 533
3. *Held*, that these words, by a necessary implication, gave a discretionary power to the assignee to sell upon credit, and, therefore, according to the judgment of the Court of Appeals in *Nicholson v. Leavitt*, rendered the assignment, upon its face, fraudulent and void. *id.*

ATTACHMENT.

1. A justice of the Superior Court, on the 28th December, 1848, issued an attachment against the property of H. & Co., merchants at Vera Cruz, as non-resident debtors. The application for the attachment did not state that the contract, from which the debt arose, was made within this state, or that all the applicants were residents of the state; and it appeared on the face of the pleadings, that one of the applicants was, in fact, a resident in France. *Renard v. Hargous*, 540

2. *Held*, that the Justices of the Superior Court, from the 1st of January, 1880, until the 1st of July, 1847, had authority, under the provisions of the Revised Statutes, as *ex officio* Supreme Court Commissioners, to issue attachment against absconding or non-resident debtors. *id.*

3. *Held*, further, that although the office of Supreme C. Commissioner was abolished from and after the 1st of July, 1847, yet the power of the Justices of the Superior Court to issue such attachments, was preserved and continued to them by the 7th section of the act providing for the election of the Justices of that Court, passed 12th May, 1847. *id.*

4. *Held*, therefore, that the judge who issued the attachment in question, had jurisdiction. *id.*

5. *Held*, further, that the attachment, and the proceedings thereon, were not rendered void by the fact, that one of the applicants resided in France, it appearing that the debt was due to them as partners, and that their business as a mercantile firm was conducted in the city of New York, where the partners who managed the business then resided. *id.*

6. The application for the attachment stated, that the debt arose upon a contract, whereby the debtors contracted to sell certain merchandise delivered to them, and account for, and pay over the proceeds to the applicants; but the demand proved upon the trial, and for which the verdict was given, included a sum of money advanced by the applicants to the debtors in the city of New York. *id.*

7. *Held*, that the sum so advanced ought not to have been included in the verdict, and must be deducted therefrom, as it was no part of the demand stated in the application; and therefore no part of the demand for which the defendant, by virtue of the bond given by him, to discharge the attachment, was liable. *id.*

B

BAILMENT.

See COMMON CARRIERS.

BANKS.

See CHECKS.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. R. D. for a good consideration made his promissory note to C., and B. endorsed the same for his accommodation. C. before the note attained maturity, endorsed and transferred it for value to the plaintiff, who brought the action against R. D. as maker, and B. as endorser. *Pierson et al. v. Boyd et al.* 33

2. *Held*, that whether C. was or was not liable to B. as first endorser, the latter was clearly liable as endorser to the plaintiff, the facts that the note was transferred to them by C., and that they knew B. to be an accommodation endorser, constituting no defence. *id.*

3. The sworn answer of the defendant B. admitted that he had received notice of the protest of the note, but alleged "the want of sufficient knowledge to form a belief whether or not he received due notice of said protest." *id.*

4. *Held*, that considering the answer as an affidavit, it was not such an affidavit as the statute requires in order to exclude the certificate of the Notary from being read in evidence. *id.*

5. It was proved that a notice in proper form was served on the right day at B.'s place of business by placing it under the door, but the witness did not state at what hour the service was made, nor whether the room was open or closed. *id.*

6. *Held*, that although this proof, if standing alone, would have been un-

satisfactory, yet that connecting it with the admissions in the defendant's answer it was, as evidence of a due service, at least *prima facie* sufficient.

id.

7. Notes, having no previous inception, if discounted at more than 7 per cent. per annum, are void for usury. The accommodation endorsers of such paper are not liable, although the last endorser may have endorsed it, on the understanding that the proceeds should be used to take up acceptances which he had made for the makers, and which it was the duty of the latter to pay. *Williams v. Storm*, 52

8. The certificate of a notary at New Orleans relative to the demand of payment and notice of dishonor of a promissory note payable in that city, although legal proof of the facts by a statute of Louisiana, cannot be read in evidence in the courts of this state. *Kirtland v. Wanser*, 277

9. Although in many cases a foreign law must be followed, as a rule of final decision, there are none in which it can be permitted to set aside our own rules of evidence. *id.*

10. It is only in relation to foreign bills of exchange that the protest of a foreign notary can be read in evidence, and a promissory note is not converted into a bill of exchange by being made payable in a foreign place. *id.*

11. The provisions of our own statute upon this subject apply only to protests made within this state by our own notaries. *id.*

See ACTION, 4.
CONSIGNOR AND CONSIGNEE, 6.
WITNESS, 4, 5.

C

CHARTER PARTY.

1. J. O., an agent of the defendants, on the 2d of April, 1847, addressed a letter to the plaintiffs in which he

stated that "he had chartered on their account the A 1 ship Sarah for a voyage from Baltimore to Havre." The letter set forth in detail the terms of the contract and concluded with these words: "The ship to proceed from the port where she now is to Baltimore without delay." It was known to the parties that she was then in the port of Boston. On the 5th of April the plaintiff and defendants executed a charter-party in due form, which stated that the ship was then lying in the port of Boston, but contained no stipulation as to the time within which she was to proceed from that port to Baltimore. The action was upon the agreement in the letter, and the breaches alleged were that the ship was not A 1, and did not proceed without delay from Boston to Baltimore. *Renard v. Sampson*, 285

2. Held, that the charter-party, although not by express words, yet by intendment of law, covered the voyage from Boston to Baltimore, as well as from Baltimore to Havre, and bound the defendants to commence that voyage within a reasonable time. *id.*

3. Held therefore, that the agreement in the letter was merged in the charter-party, and that parole evidence to vary the legal construction of the latter was inadmissible. *id.*

CHECKS.

1. A bank-check, payable to the order of bills payable, as it cannot be passed by an endorsement, is, in judgment of law, payable to bearer. *Willetts v. Phoenix Bank*, 121

2. It stands upon the same ground as a check payable to the order of a fictitious person. *id.*

3. The certifying of a check as "good," is not a mere declaration of an existing fact, but creates a new and binding obligation on the part of the bank. *id.*

4. The meaning is, not merely that the check was "good" when certified, but that it shall be "good" when presented for payment. *id.*

5. A certified check is, therefore, as truly an absolute unconditional promise to pay upon demand the sum which it specifies, as an ordinary bank-note; and *laches*, in making the demand, is no more imputable in the one case than in the other. *id*
6. *Held*, upon these grounds, that the plaintiffs, holders for value, were entitled to recover the sum advanced by them upon four checks, certified by the defendants, although payment was not demanded until two months after the checks were certified, and in the interval the maker had withdrawn, upon other checks, all his funds from the bank. *id*
7. The action was against the defendant, as endorser of a check, payable at a bank in Connecticut, on a day subsequent to its date, which was presented for payment on that day, and due notice of its dishonor given to the defendant. It was proved on the trial, that it was the usage of all the banks in Connecticut not to allow days of grace upon checks on time, and that, by the laws of Connecticut, the allowance of grace is governed by usage. *Bowen v. Newell*, 584
8. *Held*, that evidence of the usage, and of the law, of Connecticut was properly admitted, and established, conclusively, the right of the plaintiff to recover. *id*
9. To render those who transport persons for hire responsible for the loss of baggage, it must be placed under their charge, and it is not so placed when the passenger retains possession and trusts to his own care for its safety. *id*
4. The defendants, an Express Company, received from the agents of the plaintiffs at New Orleans, a package, valued at \$40,000, to be transported and delivered to the plaintiff at New York. By the terms of the receipt given for the package, the defendants were not to be responsible for any loss or damage not arising from their own fraud or gross negligence, or that of their servants; and it was proved that there was the same care in the transportation of all articles without regard to their value. When the package arrived at New York, the defendants refused to deliver it to the plaintiff, unless upon the payment of \$400, being 1 per cent. upon its estimated value. *Holford v. Adams*, 471
5. *Held*, that, under these circumstances, there was no reason for enhancing the charge for transportation in proportion to the value of the articles transported, and that the charge made was therefore, *prima facie*, unreasonable and extravagant. *id*
6. *Held* also, that the charge was not justified by usage, the usage proved not being general, but that of the defendants alone, and there being no proof that it was known to the plaintiff or his agents. *id*

COMMON CARRIERS.

1. The plaintiff, an emigrant German, was a steerage passenger in a ship owned by the defendants, on a voyage from Liverpool to New York, and during the voyage, his trunk containing wearing apparel, &c., was stolen and never recovered. *Cohen v. Frost*, 335
2. *Held*, that as it appeared that the trunk was in the exclusive possession and custody of the plaintiff himself, and that he trusted to his own care and vigilance to protect him against its loss, the defendants as common carriers were not bound to indemnify him. *id*

COMPLAINT.

See PRACTICE.

CONSIGNOR AND CONSIGNEE.

1. A remittance by a factor to his consignor is at his own risk, unless made under a prior direction or authority. *Heubach Brothers v. Mollman*, 227
2. When he has been directed or authorized to remit, he is answerable only for good faith and due diligence. *id*

3. The guaranty of a *del credere* commission is limited to the payment of the price of goods sold upon credit, and does not extend to the remittance of funds received. *id.*

4. But when, by the agreement of the parties, the factor is entitled to charge a guaranty commission upon exchange remitted, he cannot discharge himself from his liability by omitting to charge the commission. *id.*

5. When a factor charges himself, by anticipation, with the price of goods sold upon credit, the remittance then made by him is of his own funds, in discharge of a personal debt, and is therefore made at his own risk. *id.*

6. *Semble*, that the weight of authority is, that a factor, who endorses generally the bills which he remits, renders himself personally liable, upon his endorsement, to his principal, as well as to third persons. *id.*

CONSTRUCTION.

The words, "proceedings to compel the determination of claims to real estate," in § 308 of the Code, refer only to the special proceedings authorized by the revised statutes. *Bridges v. Miller*, 688

Of § 31, in the title of Ejectment, in R. S., see Action 5, 6, 7.
Of 428, Code, see Judgment, 5.
Of 283 & 284, Code, see Practice 23.
Of 144, 147, 148, Code " 16.
Of 176, " " 30.
Of 184, Code, Sub. 4, " 28.
Of 244, " " 5, " 82, 83, 84.
Of 120, 167, Code, " 36.
Of 123, " " 42.
Of 121, " " 50.

CONSULS.

See PRACTICE, 46, 47.

CONTRACT.

1. In an action to recover damages for the breach of a contract, relative to

the sale and exchange of lands, if the only defence set up in the answer is, that the premises were in fact encumbered by judgments, the defendant is not permitted to show that there were outstanding judgments, which, although not a real, were an apparent lien, rendering the title unsatisfactory, and justifying his refusal to accept it. *Pagan v. Davison*, 153

2. A title, which is required to be satisfactory to the party by whom it is to be received, means a title to which there is no reasonable objection, and with which the party ought to be satisfied. Such a title he is bound to accept. *id.*

3. When the complaint alleges that the defendant was requested, and refused, to convey, and the allegation is not denied by the answer, no proof of a demand of the deed is necessary to be given upon the trial. *id.*

4. When it is proved that the premises to be conveyed by the plaintiff were of less value than those to be conveyed to him by the defendant, this difference of value, together with the expense of examining the title, is the true measure of damages. *id.*

5. Special damage is only necessary to be averred, when it constitutes in part the cause of action. *id.*

COSTS.

See PRACTICE.

COVENANT.

1. A covenant in a contract for the sale of lands that the premises "shall be free and clear from encumbrances," if a conveyance is thereafter delivered to, and accepted by the purchaser, is merged in the deed. *Carr v. Roach*, 2

2. If an incumbrance is thereafter found to exist, which the purchaser is forced to satisfy, his sole remedy is against his grantor upon the covenant in the deed. *id.*

3. These rules apply, even where the agreement to sell the lands is made by one person, and the deed is given by another, and when the agreement contains a provision that the consideration is not to be paid until "it can be ascertained that the title to the premises is good, and unencumbered." *id.*

4. Such a provision makes it the duty of the purchaser to examine the title before he accepts the conveyance, and is evidence of the understanding of the parties that the delivery and acceptance of the deed covenanted to be given, would be a fulfilment and discharge of the agreement. *id.*

5. Upon these grounds a verdict taken for the plaintiff, subject to the opinion of the court, set aside, and a verdict and judgment thereon entered for the defendants. *id.*

COVERTURE

1. The defendant was sued as the maker of two promissory notes, and the only defence set up was coverture. It appeared that she was a native of Prussia, but had lived in New York for more than seven years; and during that time had carried on business in her maiden name, as a *feme sole*. It also appeared that her husband, to whom she had been married more than twenty years, had continued to live in Prussia, and by the law of that country could not leave the kingdom without the express permission of the government. *McArthur v. Bloom*, 151

2. *Held*, that the defendant, under these circumstances, might justly be considered and treated as a *feme sole*, and that the plaintiffs were therefore entitled to judgment. *id.*

3. If a married woman is sued alone, on a contract made by her during coverture and does not plead the coverture, but allows judgment to pass by default, and subsequently applies, on motion, to the discretion of the court, to set aside the judgment, and execution issued thereon, the court will not interfere, when it appears, in answer

to the motion, that she obtained the credit by representing herself to be a widow, and that the plaintiffs had no notice to the contrary, but will leave her to her remedy by appeal, or to other remedies that may exist, for enforcing strictly legal rights. *Genet v. Dusenbury*, 679

See PRACTICE, 38, 39.

D

DAMAGES.

1. In an action of assault and battery causes of provocation cannot be admitted in evidence in mitigation of damages, unless they happened at the time of the assault, or immediately preceding it, so as to form part of one transaction. *Willis v. Forrest*, 310

2. In such an action, proof of the general character of the plaintiff cannot be received in mitigation of damages. *id.*

See CONTRACT, 4, 5.

DEBTOR.

See PRACTICE, 44, 45, 46, 47.

DECREE

See ACTION, 8.
PRACTICE, 48.

DEVISE

1. B. McGowan, by his last will devised all his estate to his wife "for her own behoof, and the maintenance of his children, and upon his son John (the youngest child) becoming of age, the whole estate to be equally divided among his seven children (naming them), and that should death take either from the world, it should be equally divided among the survivors." *McGowan v. McGowan*, 57

2. *Held*, That the devise created no trust suspending the power of alienation, and that, at any rate, the suspense, if any was created, could not exceed a single life in being at the death of the testator. *id.*

E

EASEMENT.

See AGREEMENT, 1, 2, 3, 4.

EQUITABLE RELIEF.

See SALE OF LANDS, 1, 2, 3.
PLEADING 16, 17, 18.

EVIDENCE.

1. When the liability of a defendant is sought to be proved by his verbal declaration or admissions to a witness, all the conversations between him and the witness, bearing upon the subject of the controversy, must be submitted to the consideration of the jury. *Nesbit v. Stringer & Townsend*, 26
2. The omission of a party on whose behalf a sheriff is acting to interfere with him in the discharge of his duties, or to complain of the manner in which they are performed, is no evidence of his assent to the sheriff's neglect or violation of duty. *Moore v. Westervelt*, 59
3. Hence where such omission is the only proof of the assent of the party that is relied on, the question whether the assent was given ought not to be submitted to the jury. *id.*

See NEGLIGENCE, 1, 2.

4. An assignment, or other instrument in writing, to which there is no subscribing witness, when it comes from the possession of the person entitled to its custody, may be read in evidence, upon proof of its being genuine,

without proof of its actual execution at the time of its date; this, when no circumstances of suspicion are shown, will be presumed. *St. John v. Amer. Mut. Life Ins. Co.*, 419

5. Where goods purchased by, and delivered to A. for his own use and as his own property, are, by his direction, charged to B., the transaction is within the mischief that the statute of frauds was designed to prevent; and in an action against B., the parol evidence against him, as purchaser, ought to be free from any suspicion. *Smith v. Le-lund*, 497

6. A recovery in such an action ought not to be permitted when A. is the only witness on behalf of the seller of the goods, and is contradicted by other witnesses. *id.*

See BILLS OF EXCHANGE, 8, 9, 10, 11.

CHARTER PARTY, 2, 3.
CHECKS, 8.
CONTRACT, 8.
DAMAGES, 1, 2.
INSURANCE, FIRE, 8.
MORTGAGE—CHattel, 4, 5.
MALICIOUS PROSECUTION, 10.
PLEADING, 9.

EXCEPTIONS.

See PLEADING, 23.

EXECUTION.

See PRACTICE.

EXECUTORS & ADMINISTRATORS.

1. When a claim against an estate is not presented to the executors or administrators within the 6 months prescribed by the Revised Statutes, the only effect of the omission is to limit the recovery in a subsequent suit by the creditor to the amount of the assets in the hands of the executor or administrator at the time of the commencement of the suit, and to deprive the plaintiff of all right to recover costs. (2 R. S., p. 88, § 24.) *Baggett v. Boulger*, 160

2. The right of action is only barred when the claim was presented, and having been disputed or rejected was neither referred nor prosecuted within 6 months thereafter. (2 R. S. ib. §§ 88, 89, 40, 42.) *id.*

3. Where an order is made by the surrogate for the payment of a sum of money by the administrator to a creditor or distributee, and the order upon appeal has been affirmed by the Supreme Court, the administrator is estopped by such affirmance from alleging any error or defect in the proceedings before the surrogate. *id.*

4. An order which concludes the administrator equally concludes his sureties. *id.*

5. An administration bond is more than a bond of indemnity; its breach gives an immediate right of action against the sureties. *id.*

6. An order of the surrogate directing the prosecution of the bond and declaring it to be assigned, is a sufficient assignment within the statute; the surrogate, not being a party to the bond, cannot assign it as an obligee. *id.*

7. The action upon the bond is, under the Code, properly brought in the name of the person for whose benefit its prosecution is directed. *id.*

F

FACTOR.

See COMMISSION AND COMMISSIONER.

FRAUDS, STATUTE OF.

See PLEADING, 5.

I

INSURANCE—FIRE.

1. By the terms of a policy of insurance, against fire, the subject-matter insured

was described as "a barque (on the stocks near said ship), building for," &c., "with privilege to build another vessel alongside," "in a ship-yard, on the west side of Taunton River, Massachusetts." *Hood v. Manhattan Fire Ins. Co.* 191

2. *Held*, that the policy not only covered so much of the contemplated barque as was actually on the stocks, but also such parts of the framework being in the ship-yard, as had been so far wrought, with the design to make them a part of the contemplated barque, as to be in a condition to be framed, and actually incorporated into the parts on the stocks, and which were in the proper place to be conveniently applied to that use, and which, by reason of being so wrought and fitted, were substantially valueless for any other purpose. *id.*

3. A policy of insurance against fire, upon which the action was brought, contained this clause, "camphene, spirit gas, or other burning fluid, when used as a light, subjects the goods, &c., to an additional premium of 10 cents per \$100, and premium for such use must be endorsed in writing upon the policy." The complaint did not aver that camphene, &c., was not used as a light, or, if used, that the premium was endorsed upon the policy. *Hunt v. Hudson River Fire Ins. Co.* 481

4. *Held*, that it was not necessary to negative in the complaint a breach of this provision—its observance not being necessary to be proved on the trial as one of the facts constituting the cause of action. If broken, the breach was a matter of defence, which, as such, should have been stated in the answer. Quere, whether the clause ought to be construed as a stipulation against the use of camphene equivalent to a warranty! *id.*

5. A clause in a policy of insurance against fire, declared that "camphene, &c., when used in stores or warehouses as a light, subjects the goods therein to an additional charge of ten cents per hundred dollars, and premium for such use must be endorsed on the policy." *Westfall v. Hudson River Fire Ins. Co.* 490

6. *Held*, that these words were not a conditional prohibition of the use of camphene, but merely exempted the insurers from any liability for a loss resulting from such use, unless the additional charge had been paid. They created an exception, not a warranty. *id.*
7. *Held*, therefore, that as there was no evidence that the loss resulted from the use of camphene, and there was no other defence than a breach of the alleged warranty, the plaintiff was entitled to judgment. *id.*
8. The policy of insurance, on which the action was brought, contained a provision, that, in case of any loss or damage by fire, to the property insured, the plaintiff should forthwith give notice thereof to the defendants. The complaint averred that the property insured was destroyed by fire on the 20th of May, 1852; and that as soon as possible thereafter, that is to say, on the 24th May, 1852, the plaintiffs gave notice thereof to the defendants. *Held*, that the plaintiffs were not precluded by the terms of their complaint from showing on the trial that the proper notice was given on the morning of the 21st May; and *Held* further, that this notice satisfied the provision in the policy. *Hovey v. Amer. Mut. In. Co.* 554
9. The policy bound the plaintiffs to keep and maintain a night-watch on their premises during the continuance of the policy. *Held*, that evidence offered by the defendants upon the trial, of a parol agreement that the night-watch employed by the plaintiffs should have the care and watching of no other premises at the same time, was properly rejected. *id.*
10. The defendants, upon the trial, required the judge to charge, that the employment of a person as a night-watch, whose duty was in any manner divided by an employment to watch other premises, was not a fulfilment of the condition in the policy. The judge refused so to charge, but charged the jury that if the night-watch employed by the plaintiff was employed to act exclusively upon their premises, and was a competent and proper person to be so employed, and did keep exclusively on the plaintiffs' premises in the faithful discharge of his duty, and the plaintiffs were ignorant of any engagement made by him with other persons, then the mere facts that he had made such an engagement, and had rendered services under it, would not be a bar to the plaintiffs' recovery. *id.*
11. *Held*, that the refusal of the judge to charge as required, and the charge which he actually gave, were correct. The jury having found the facts submitted to them in favor of the plaintiffs, *Held*, that their judgment could not be disturbed. *id.*

INSURANCE—LIFE

1. The construction and effect of a policy of insurance made by a company incorporated in Connecticut, are governed by the law of that State. *St. John v. Am. Mut. Life Ins. Comp.* 419
2. A wager policy is a valid contract at common law, and it must be presumed, until the contrary is shown, that it is so by the law of Connecticut. *id.*
3. The assignee of a policy of insurance upon life, in trust for the wife of the assured, upon his death may maintain an action for the recovery of the sum insured in his own name, as trustee of an express trust. Neither the wife nor the personal representatives of the deceased, are necessary parties. *id.*
4. The assignee for value of a policy of insurance effected by the assignor, upon his own life, is entitled, upon the death of the assignor, to recover the whole amount insured, without reference to the consideration paid by him for the assignment. *id.*
5. Every policy of insurance upon life is valued; that is, the interest meant to be covered, is valued at the sum insured. *id.*

INSURANCE—MARINE

1. The defendants insured the plaintiff for the sum of \$10,000 upon freight. The insurance was against total loss only, and the policy contained an express stipulation, that the defendants "should not be liable for any partial loss whatever." *Ogden v. General Mut. Ins. Comp.*, 204
2. *Held*, that the insurance was upon the whole freight as one integral subject, and not upon the separate items of freight, upon distinct and separate parts of the cargo, shipped by different shippers. *id.*
3. *Held*, therefore, that if any freight had been earned, or could have been earned upon any part of the cargo, the plaintiff was not entitled to recover. *id.*
4. The ship to which the insurance related, returned in distress to New York, her port of departure. Before her arrival on this return, there had been a necessary jettison of a part of her cargo; another part was so damaged that it could not be reshipped; but the residue was wholly undamaged. The ship was repaired within a reasonable time, at a cost of much less than half her value, and then proceeded with a full cargo to her original port of destination; but, in the interval, the master had sent forward the undamaged goods by another ship, at an increased freight, exceeding largely that which he was entitled to receive upon them. *id.*
5. *Held*, that there was no total loss of freight within the meaning of the policy, since the master might have entitled his owner to freight upon the undamaged goods, by retaining them, and carrying them forward in his own vessel. The loss of freight, therefore, upon these goods, was not owing to the perils insured against, but to an unnecessary and voluntary act of the master. *id.*
6. *Held*, also, that as the undamaged goods, although sent forward in another ship, arrived in safety at their port of destination, freight was in fact earned upon them; and that, with

the increased cost of earning it, as it was not in any legal sense a consequence of any peril insured against, the defendants as insurers had no concern. It formed no part of a loss for which they could be liable. *id.*

J

JUDGMENT.

1. Judgment for the defendant upon a dismissal of the complaint, in an action at law, is no bar to a subsequent action by the plaintiff for the same cause. *Harrison v. Wood*, 50
2. That the plaintiff in an action for a tort, when the jury have improperly severed the damages, may enter his judgment against all the defendants for the largest damages found against any one of them, is an inequitable doctrine which the Court, unless constrained by the authorities, would refuse to follow. *Bulkeley v. Smith*, 261
3. Whether the authorities in support of the doctrine are conclusive the Court declined to consider, being satisfied upon other grounds that the judgment appealed from was erroneous. *id.*
4. The mere fact that a judgment confessed, is confessed to secure as well a debt owing to a creditor other than the plaintiff, as one owing the latter, does not render it fraudulent and void as against creditors. *Paton v. Westervelt*, 362
5. The proper remedy for enforcing a judgment, by the personal representative or assignee of a deceased plaintiff, is by action under § 428 of the Code. *Jay v. Martins*, 654

See PRACTICE, 29.

JURISDICTION.

1. The Superior Court has no jurisdiction to appoint a receiver of the

- property or effects of a foreign corporation, for the purpose of winding up its affairs. *Day v. U. S. Car Spring Co.*, 608
2. No court of justice can restrain commissioners of excise from granting licenses in the exercise of the discretion given to them by the statute, when no excess of authority, or actual corruption, is averred in the complaint. *Leigh v. Westervelt*, 618
3. It is very doubtful whether the Superior Court has jurisdiction of a proceeding under the R. S. for the dissolution of a moneyed corporation. *Kattneroth v. Astor Bank*, 632
4. It is clear that the court has no authority to exercise the visitatorial powers that were formerly vested in the Court of Chancery. *id.*
5. The Superior Court has jurisdiction of an action for the partition of real estate, situate within the city and county of New York, irrespective of the residence of the parties (Code, § 123, sub. 2, and § 38, sub. 1). *Varian v. Stevens*, 635
6. Jurisdiction over the person is as fully acquired by the voluntary appearance of the defendant, as by service of a summons (Code, § 139). *id.*
- expiration of the term is entitled to retain the possession until the covenant shall be performed by the landlord or his representatives. *Holman v. Abrams*, 435
2. But the tenant so retaining the possession is not discharged from the payment of rent, but is subject to the general rule, that a tenant holding over after the expiration of his lease, with the consent of the landlord, becomes a tenant from year to year, subject to all the terms and conditions of the original lease. *id.*
3. The landlord, however, is equally bound by the same rule, and therefore in an action for use and occupation, can recover no more than the rent originally reserved. He is not entitled to an increased rent proportioned to the increased value of the premises. *id.*
4. The decision of the Supreme Court in *Abel v. Radcliff*, 15 John. 505, is not applicable when the improvements made by a tenant during his term at its expiration belong to him, and not to his landlord. That case is, moreover, of doubtful authority. *id.*

See ATTACHMENT, 1, 2, 3, 4.
PRACTICE, 26, 46, 47.

L

LANDLORD AND TENANT.

1. Where a lease for a term of years contains a covenant on the part of the landlord, that at the expiration of the term the tenant shall be paid the appraised value of a dwelling-house to be erected by him on the demised premises, or that a new lease for the same term of years, at an appraised rent, (excluding from the appraisement the value of the dwelling-house) shall be granted to him; the tenant at the
- In March, 1851, the plaintiff leased to the defendant a house in the city of New York, for the term of one year from the 1st of May following, at a rent, payable quarterly, of \$750. In April, the defendant being desirous to give up her lease, made known her wishes to the plaintiff, who then entered into a new agreement, in writing, with a Mrs. K., by which the latter assumed the lease, bound herself to perform all its covenants, and to pay the rent reserved monthly in advance. Mrs. K. entered into possession, under this agreement, and paid the accruing rent to the plaintiff, with the exception of the last quarter's.
- To recover the balance, the plaintiff brought this action, claiming that the defendant was liable for its payment under the original lease.
- Held*, that the new agreement between the plaintiff and Mrs. K. operated in

law to discharge the defendant from the covenants of her lease, and was a virtual acceptance by him of the surrender which she then offered to make. *Murray v. Shave*, 183

LEX LOCL

See CHECKS, 7, 8.

BILLS OF LADING AND PROMISSORY
NOTES, 8, 9, 10, 11.

LIEN LAW.

See ACTION, 13.

LIS PENDENS.

See ACTION, 13.

MI

MALICIOUS PROSECUTION.

1. To maintain an action for a malicious prosecution, the plaintiff is bound to prove the entire want of a probable cause for the accusation, and the actual malice of the defendant in preferring it—that is, malice in fact as distinguished from malice in law. *Bulkely v. Smith*, 261
2. Malice, therefore, in all cases, when the cause turns upon its proof, is a question of fact to be decided by the jury. *id*
3. But probable cause is, in all cases, a question of law, in relation to which the judge who tries the cause, is bound to express a positive opinion. *id*
4. It is no more a mixed question of law and fact than every other question of law, which a judge in the course of a trial is required to determine. *id*
5. If the judge who tries the cause is of opinion that the facts admitted or clearly established, are not sufficient

to prove a want of probable cause, he must either nonsuit the plaintiff, or direct the jury to find a verdict for the defendant. *id*

6. But if the facts, upon which in his judgment the question depends, upon the evidence are doubtful, he must instruct the jury, that if they shall be found by them in a certain manner, they do or do not amount to a want of probable cause. *id*

7. If, instead of such a direction, he leaves it to the jury to determine, not only whether the facts alleged by the plaintiff are true, but whether, if true, they prove a want of probable cause, he commits a fatal error. *id*

8. The judge, in the case under hearing, instructed the jury to consider and determine whether the facts and circumstances known to the defendants were reasonable grounds for their believing that the charge which they had made against the plaintiff was true.

Held, that this instruction was erroneous, as necessarily involving a submission to the jury of the question of probable cause, the existence of reasonable grounds for believing the charge preferred to be true and of a probable cause for making it, being only different forms of expressing the same truth. *id*

9. When the existence of facts constituting a probable cause is admitted or established, the presumption of law is that the defendant entertained and acted upon the belief which the facts thus known to him justified him in holding.

Hence, unless this presumption is repelled by proof on the part of the plaintiff, the question of the actual belief of the defendant ought not to be submitted to the jury. *id*

10. The charge against the plaintiff was that upon the trial of a cause in which he was examined as a witness, and was a material witness—he had sworn falsely that he had no interest in the event of the suit. If such was his testimony, it was clearly shown that there was probable cause for believing

it to be false; but the main controversy upon the trial was whether he had in fact sworn as the defendants in making the charge had alleged.

Held, that in order to justify the defendants, it was not necessary for them to prove that the plaintiff had sworn in terms that he had no interest in the event of the suit, but that their defence was established, if it appeared that he had sworn in substance, although not in words, that he had no interest that could disqualify him as a witness. *id.*

11. *Held further*, that it was proved by the plaintiff's own witnesses that such was the substance and necessary result of his testimony. *id.*

MORTGAGE—CHATTEL.

1. Where, by the terms of a chattel mortgage, the mortgagee has an immediate right of possession, the property cannot be levied on and sold under an execution against the mortgagor. *Hull v. Carnley*, 99
2. But where the mortgagor has a right of possession for a limited period, the weight of authority is, that his possessory interest is a proper object of levy and sale. *id.*
3. The sale, however, in this case, must be confined to the interest of the mortgagor, for if the sheriff, having notice of the mortgage, sell the entire property as that of the mortgagor, he renders himself liable to the mortgagee, at least to the extent of the mortgage debt. *id.*
4. A provision in a mortgage that the mortgagor may retain the possession until a default in the payment of the debt, is no evidence of a trust, affecting the validity of the mortgage. *id.*
5. If the continual possession of the mortgagor under such a provision is any evidence of fraud, it only raises a presumption that may be repelled,

and the finding of a jury or judge negating a fraudulent intent, is conclusive. *id.*

MORTGAGE—REAL.

See ACTION, 8.

MUNICIPAL CORPORATION.

See PRACTICE, 40, 41, 42, 43.

N

NEGLIGENCE.

1. A vessel in the custody of the sheriff was lying near one of the wharves of the city, when there were strong indications of an approaching storm, but he took no measures himself nor instructed any one to take any measures on his behalf, for the safety of the vessel, and during the night a storm arose in which she sunk. *Moore v. Westervelt*, 59
2. *Held*—that the question whether reasonable care and diligence had been used by the sheriff to guard the vessel against the consequences of the storm ought not to have been submitted to the jury, but a positive instruction ought to have been given that he had been guilty of negligence, which rendered him liable. *id.*

O

OFFICER.

See TREASON.

P

PARENT AND CHILD.

See ACTION, 1, 2.

PARTIES.

See PRACTICE.

PARTNERS.

A partner is not allowed to claim for his services in settling the affairs of the firm, unless a special agreement is averred and proved. *Coursen v. Hamlin*, 518

See ACTION, 14, 15.

PARTY WALL.

1. A., owning two lots of ground adjoining each other, sold and conveyed one of them, and by a clause in the deed provided that the grantee might erect a party wall on the line dividing the two lots, one half on each lot, and covenanted to pay for the wall when used; and A.'s grantee erected such a party wall, and then conveyed the lot and building so erected to B. *Held*, that B., on such party wall being used by A.'s subsequent grantee of the adjoining lot, might recover of A., and he being dead, of his executors, one half of the value of the party wall. *Burlock v. Peck*, 90
2. *Held*, also, that B., having died intestate, after the party wall had been used and appropriated by the grantee of the adjoining lot, the action was properly brought by her administrator. *id*
3. That the party wall, when used, was the property of B., and she was equitably entitled to receive the money to be paid for using it. That by using and appropriating it, the title to so much of it as stood on the adjoining lot was vested in the grantee thereof, and did not, on the subsequent death of B., descend to her heir at law. The right to compensation, was a right in action, enforceable at the suit of the administrator of B. *id*

PERPETUITIES.

See DEVISE.

PLEADING.

1. The Code has abolished technical rules of pleading, but has not abolished those which good sense prescribes, and are necessary to carry into effect its own provisions. *Gihon v. Levy*, 176
2. Facts, relied on as constituting a defence, must be set forth at least with so much certainty as to enable the court to say that, if true, the action is barred. *id*
3. Hence, when an award is pleaded, that the court may judge of its validity as a bar, its substance, if not its terms, must be set forth. *id*
4. When no other ground of demurrer is meant to be relied on than the insufficiency in law of the matters set forth in the complaint to maintain the action, it is specified as distinctly as can be required, in the words of the Code, "That the complaint does not state facts sufficient to constitute a cause of action." *Paine v. Smith*, 298
5. When the action is founded upon an agreement, which would be void under the Statute of Frauds, unless in writing, and signed by the party to be charged, these facts, as constituting in part the cause of action, must be averred in the complaint. *Thurman v. Stevens*, 609
6. In an action against the defendant as acceptor of a bill of exchange, which was addressed to J. L., President of the Astor Bank, and accepted by him, as president, the complaint did not aver that the bank accepted the bill, or that J. L. was president, or, as president, had any authority to accept. *Andrews v. Astor Bank*, 629
7. *Held*, that it sufficiently appeared upon the face of the bill, that it was drawn upon, and duly accepted by the bank. *id*
8. In an action to recover damages for the wrongful detention of personal property, it is not necessary to set forth the plaintiff's title in the complaint. A general averment of own-

- ership is sufficient. *Heine v. Anderson*, 318
9. Under such a complaint a bill of sale from the former owner may be given in evidence. *id.*
10. In determining upon a demurrer, whether matters separately pleaded constitute a defence, the court will take into consideration all those parts of the answer which precede that which is covered by the demurrer. *Beach v. Bordell*, 327
11. The sufficiency of the defence may, in many cases, depend upon the fact, whether the allegations in the complaint have been admitted or denied. *id.*
12. As a general rule, it is a good defence to an action to recover the value of personal property, as unjustly detained, that it had been delivered to the true owner before the commencement of the suit. *id.*
13. Whether an instrument in writing is or is not a valid mortgage is a question of law, and to enable the court to determine it when the action is founded upon the writing, either the whole instrument, or those provisions which are relied on as giving to it the character of a mortgage, must be set forth in the complaint. *Fairbanks v. Bloomfield*, 349
14. When the complaint averred that the defendants had seized and taken possession of a vessel, the value of which was sought to be recovered under an attachment issued under the laws of Connecticut, and did not show nor aver that the attachment was void; *id.*
15. *Held*, that the refusal of the defendants to deliver the possession was justifiable upon the face of the complaint. Judgment for defendant upon demurrer to the complaint. *id.*
16. The plaintiffs by their complaint demanded judgment as follows: 1. For a certain sum alleged to be the balance due to them upon a building contract between them and the defendant. 2. For another sum for extra work and materials. 3. For another sum as damages sustained by them by reason of having been hindered and delayed by the defendant in the completion of this work. And lastly: That a certain award, made by an arbitrator mutually chosen, in relation to certain disputes growing out of the contract, should be set aside as obtained by fraud or undue influence. *See v. Partridge*, 463
17. *Held*, that as equitable and legal relief may now be sought in the same action, and all the causes of action set forth in the complaint grew out of the same transaction, they were properly united. *id.*
18. *Held*, that as the action was not for the recovery of money only, it was properly heard at special term without a jury, and that the court, although denying the equitable relief demanded, had power to grant any other relief consistent with the case made by the complaint and embraced within the issue. *id.*
19. *Held*, therefore, that although the court at special term held the award to be binding on the parties, its judgment in favor of the plaintiffs upon the other causes of action set forth in the complaint, was valid. *id.*
20. In an action against B, for the price of goods sold and delivered to A, and by his direction charged to B, a recovery ought not to be permitted, when the complaint avers that the goods were sold and delivered to B. *Smith v. Leland*, 497
21. The authority of A. to make the purchase in the name of B, and the delivery of the goods to him, with the consent of B, are material and issuable facts, which the plaintiff is bound to prove upon the trial, and is, therefore, bound to aver in the complaint. *id.*
22. The defence of usury cannot be admitted under a general allegation in the answer, not stating the terms of the usurious agreement. *Watson v. Bailey*, 509
23. The refusal of the judge upon the

trial to permit the answer to be amended, so as to let in the defence, is not a ground of exception, nor ought such an amendment to be allowed. *id.*

24. A counter claim cannot be set up in an answer, which cannot be decided without bringing other parties before the court, who have no interest in the determination of the causes of action set forth in the complaint. *Coursen v. Hamlin*, 618

25. In an action, under the Code, to recover the possession of real estate, the facts set forth in the complaint must show that the plaintiff has a legal title to the premises in question; the mere averment that he has such a title is insufficient. *Lawrence v. Wright*, 673

26. Facts, constituting a cause of action, or a defence, in the sense of the Code, are physical facts, capable of being established by oral or documentary proof, not propositions, which are true in law. *id.*

27. In an action to recover damages for the breach of a covenant, if the complaint does not show, either by express words, or by a necessary implication, that the covenant is broken by the defendant, it is bad upon demurrer. *Schenck v. Naylor*, 675

28. The defect is not cured by a general allegation, that the acts set forth were "a violation of the defendant's covenant." *id.*

See PRACTICE, 10, 11, 12, 52.

PRACTICE.

1. ANSWER.
2. APPEAL.
3. APPEARANCE.
4. BILL OF EXCEPTIONS.
5. COMPLAINT.
6. COUNTER CLAIM.
7. COSTS.
8. DEMURRER.
9. EXECUTION.
10. GUARDIAN AD LITEM.
11. INJUNCTION.
12. JUDGMENT.
13. JURISDICTION.
14. MOTION.

15. PARTIES.
16. PETITION.
17. PROCEEDINGS SUPPLEMENTARY TO EXECUTION.
18. RECEIVER.
19. SECURITY FOR COSTS.
20. SUBSTITUTION.
21. TRIAL.

Answer.

1. In an action upon a promissory note, an answer, which fails to contradict the allegations in the complaint, showing the possession and property of the plaintiffs, but merely denies their right to prosecute as owners, is plainly frivolous. *Higgins v. Rockwell*, 650

See ACTION, 5, 6, 7.

BILLS OF EXCHANGE, 3, 4.

Appeal.

2. Where an appellant from the special to the general term deposits a sum of money instead of giving an undertaking, and appeals from the general term to the Court of Appeals, giving the proper undertaking, with sureties, the money so deposited must remain in court until a final determination in the Court of Appeals. *Parsons v. Travis*, 659

See PRACTICE, 44, 45.

Appearance.

3. It appearing that an order, extending the time to answer, together with a copy of the affidavit upon which it was founded, and which stated the name of the defendant's attorneys, and his absence from the city, had been served upon the plaintiff's attorney, *Held*, that the service thus made, was equivalent to a notice of appearance. *Quin v. Tilton*, 648
4. *Held*, that as the damages had been assessed without notice to the defendant, the judgment entered thereon was irregular. *id.*

5. A defendant against whom a judgment is prayed by the complaint, although no summons has been served on him, has a right to appear and answer under § 139 of the Code. *Higgins v. Rockwell*, 650

Bill of Exceptions.

6. To prevent a failure of justice, the court will order a bill of exceptions, when a case containing the exceptions has been properly settled, to be signed by the clerk, in the name of a deceased judge, who had tried the cause. *Mileschal v. Milward*, 607

Complaint.

7. When a complaint is not properly verified, the verification is a nullity; but the error does not affect the regularity of a subsequent judgment. *Quin v. Tilton*, 648
8. A general allegation in a complaint, that the defendant had received money, or property, to the use of the plaintiff, or of the assignor of the plaintiff, is bad upon demurrer. *Lienan v. Lincoln*, 670
9. Whether the money or property was so received as to render the defendant liable, is a question of law, and all the material facts necessary to present, and enable the court to determine the question, as facts constituting the cause of action, must be stated in the complaint. *id.*

See PLEADING, 5, 8, 14, 15, 20, 21, 25, 27, 28.

Counter Claim.

10. A counter claim, as defined by the Code, includes only causes of action existing against the plaintiff on the record, and on which, under the old system, an action at law, or a suit in equity, might have been maintained against him. *Gleason v. Moen*, 639

11. Hence, in an action against the maker of a negotiable note by an

endorsee, facts that, admitted to be true, amount only to a valid counter claim against the payee and endorser, cannot be set up, for any purpose, in the answer of the defendant. *id.*

12. But, if the facts, although pleaded as a counter claim, constitute a good defence by way of a set-off, or recoupment, and the note was transferred under circumstances that rendered it subject to all existing equities between the maker and payee, they may be set up as a bar, in whole or in part, to the plaintiff's recovery. *id.*

Costs.

13. The question of title to lands is, in all cases, a question of ownership. The question does not arise in an action to recover damages for the breach of an agreement to convey lands, when the only issue made by the pleadings is, whether an inchoate right of dower in the wife of the defendant was a subsisting encumbrance. *Smith v. Riggs*, 622

14. In such an action, if the plaintiff recovers only nominal damages, the defendant is entitled to full costs. *id.*

15. In an action to set aside a conveyance of real estate, an extra allowance can only be made when the case upon the trial appears to be "difficult or extraordinary," or "the prosecution or defence has been unreasonable or unfairly conducted." *Bridges v. Miller*, 638

Demurrer.

16. The objection, that there is an improper joinder of parties, when the facts appear on the face of the complaint, can only be taken by a demurrer. Code, §§ 144, 147, 148. *Beggott v. Boulger*, 160

See PLEADING, 4, 5, 10, 14, 15, 27, 28.

Execution.

17. Where an execution issued against two joint debtors has been levied upon

- the property of one of them, the plaintiff will not be allowed to countermand it, and issue a new execution for the purpose of making a levy upon the sole property of the other defendant. *McChain v. McKeon*, 645
18. Such a proceeding is emphatically unjust and illegal, when it appears that the first execution was withdrawn at the request of the debtor upon whose property it was levied, and with the express purpose of screening him from the payment of any part of the debt, and collecting the whole from the property of his co-defendant. *id.*
19. When the first execution so levied is not withdrawn, and another issued with the consent of all the defendants, the court will order the second to be set aside, and the first to be returned satisfied. *id.*
20. The rule that a levy, under an execution, upon sufficient property to satisfy the judgment, does not operate *per se* as a satisfaction, is only applicable when the collection of the debt, by force of the levy, is not defeated by the act or fault of the plaintiff. *id.*
21. An assignee of the judgment stands in the same position as the plaintiff upon the record, and the legal consequences of his acts are the same as of those of the plaintiff. *id.*
22. An execution upon a judgment cannot be issued upon the application of the executors of a deceased plaintiff. *Jay v. Martins*, 654
23. Sections 283, 284 of the Code, are only applicable when the parties to the judgment are living. *id.*
- Guardian ad Litem.*
24. When, upon the petition of infants over the age of 14, a guardian *ad litem* has been appointed in a partition suit, the order is valid, although no summons had been previously served upon the infants. *Varian v. Stevens*, 635
25. The jurisdiction of the court is, therefore, complete, when an answer on behalf of the infants has been put in by the guardian so appointed. *id.*
26. The appointment of a guardian *ad litem*, in a partition suit, is regulated by the R. S., and is made by the court (2 R. S., § 2, p. 817). *id.*
27. To such an appointment, the cases of *The People v. Hoffman* (7 Wend. 487) and *Grant v. Van Schoonhoven* (9 Paige, 225) have no application. *id.*
28. The personal service of a summons upon an infant of the age of 14, under § 134, sub. 4 of the Code, has no other use than to hasten the period, within which the plaintiff may apply for the appointment of a guardian, when the infant himself neglects to apply, since, until this appointment is made, there can be no further proceeding against the infant. *id.*
29. When it is not denied that the signatures of infants to their petitions for the appointment of a guardian *ad litem* are genuine, it is no objection to the validity of the judgment in the action in which they were defendants, that it does not appear upon the record, that proof was furnished to the court that the signatures were genuine. It will be presumed that proof was given. *id.*
30. A variance in the name of an infant as stated in the complaint, and in the petition for the appointment of a guardian, may be disregarded as immaterial, both under the Code and under the R. Statute of Amendments (Code, § 176 ; R. S., § 7, sub. 10, p. 425). *id.*
- Injunction.*
- See AGREEMENT, 1, 2, 3, 4.
- Judgment.*
- See JUDGMENT, *Ante*.
- Jurisdiction.*
- See JURISDICTION, *Ante*.

Motion.

31. A motion for the appointment of a receiver, when the order to show cause against the appointment is served before the commencement of the suit, will be denied as irregular. *Kattenbroth v. Astor Bank*, 632

32. An order for the payment of money under subdivision 5, § 244 of the Code, will not be made, unless the answer contains a plain, explicit, and full admission that a definite sum is due to the plaintiff. It will not be made when it is only to ascertain whether a specific sum is due, a critical examination of the pleadings, or of books and accounts, is necessary. *Courson v. Hamman*, 531

33. The provision in the Code is regarded by the court as a recognition and declaration of the rule which formerly prevailed in the Court of Chancery, and as going no farther. *id.*

34. The rule in that court was settled, that an order for the payment of money in court, or to a party before a final decree, could not be made unless upon an explicit and full admission by the defendant in his answer, or upon his examination before a master, that a specific sum was due. *id.*

Parties.

35. The rule, that persons only severally liable cannot be included in the same action as parties defendants, has not as a general rule, been altered by the Code. *Le Roy v. Shaw*, 626

36. The only exceptions are those created by § 167 of the Code.

37. No exception is created by § 167 of the Code, since the causes of action, which may be united under that section, must "affect all the parties to the action." *id.*

38. So, that when the action is brought upon a collateral undertaking for the debt of another, the complaint must aver that the promise was in writing. *id.*

38. In an action to remove damages for slanderous words spoken of a married woman, if the words are actionable per se, the husband is a necessary party as plaintiff. *Kenn v. Hertz*, 622

39. Where the words are actionable only by reason of special damage, the husband must sue alone. *id.*

40. When the act of a municipal corporation, against which relief is sought, affects injuriously the whole community over which the corporate jurisdiction extends, the attorney-general is a necessary party to the prosecution of the suit. *Davis & Palmer v. The Mayor of New York*, 623

41. It is only when the corporate act which is a public wrong, works also a special injury to particular individuals, that the action can be maintained in their names alone. *id.*

42. Where the presence of other parties than those mentioned in the complaint is necessary to the complete determination of a controversy, the language of the Code, § 122, is imperative; they must be brought in. *id.*

43. A judgment in an action, in which the attorney-general is a prosecuting party, binds the public which he represents, and is a bar to an action by individuals for the same cause; consequently, his presence is necessary to "the complete determination of the controversy," when the corporate act which is sought to be restrained or annulled is a public injury. *id.*

See ACTION, 14, 15, 16, 17.
PLEADING, 24.

Petition.

44. A petition for the discharge of a debtor, imprisoned under an execution, cannot be heard by a judge at chambers. It must be presented to the court at a regular special term. *In the matter of Walker*, 655

45. It cannot be heard, in the first instance, at a general term: the court at general term exercising only as

appellate jurisdiction, with the exception of the cases specified in § 265 of the Code. *id.*

Proceedings Supplementary to Execution.

46. A foreign consul cannot be examined as a judgment debtor, under the provisions of the Code; and if an order for his examination has been obtained, and served, he cannot be attached for his refusal to obey it. *Griffin v. Dominguez*, 656

47. The objection to the jurisdiction of a state court is fatal, in whatever stage of the proceedings it is raised. *id.*

Receiver.

48. When judgment creditors have acquired a lien upon a fund in the hands of a receiver, the court will not, upon their petition, make an order upon the receiver to satisfy the judgment out of the moneys in his hands, until a decree has been made in the action in which the receiver was appointed, and notice has been given to all other creditors interested in the distribution of the fund. But in order to protect the petitioners, an order will be made upon the receiver, forbidding him to make any payments out of the fund without notice to the petitioners, or their attorney, and allowing the petitioners to institute such an action against the receiver and other parties, as they may be advised. *Hubbard v. Guild*, 686

Security for Costs.

49. Where, under an order upon the plaintiff to file security for costs, an undertaking executed by two sureties is filed, the justification of one of the sureties, upon exceptions, is sufficient. *Riggins v. Williams*, 678

Substitution.

50. When a plaintiff transfers his interest after the commencement of the suit, it rests entirely in the discretion of the court, whether the assignee

shall be substituted as plaintiff, under § 121 of the Code. *Murray v. General Mut. Ins. Co.*, 607

51. No such order of substitution will be made, unless special circumstances are shown to satisfy the court of its propriety or necessity; and, in all cases, it will be made a condition, that the original plaintiff, the assignor, shall not be examined as a witness on behalf of the assignee. *id.*

Trial.

52. It rests wholly in the discretion of the judge who tries a cause whether he will permit the pleadings to be read to the jury. *Willis v. Forrest*, 810

53. When the issues raised upon the pleadings are irrelevant or immaterial, the judge is not bound to submit them to the determination of the jury, and may therefore withhold from the jury the pleadings in which they are contained. *id.*

R

RESIDENCE.

1. The plaintiff, in the year 1850, and for several years before, resided in a hired house in the City of New York, during the winter and spring, and at his country seat in the town of Flushing, Queens County, during the summer and autumn. In the winter of 1850, he was assessed in New York for a tax on his personal estate, and in the summer was assessed for a similar tax in Flushing, which he paid. He resisted the payment of the tax in New York, and filed his complaint to restrain its collection. *Douglas v. Mayor*, 110

2. Held, that whether the domicile of the plaintiff was or was not at Flushing, he was a resident of New York, and liable to be taxed as such when the tax for the city was assessed. *id.*

S

SALES

1. When neither a warranty nor a fraud in a sale is alleged, it is no defence that the goods were unsound and unmerchantable at the time of the sale. *Gihon v. Levy*, 176
2. Where the goods are in the possession of a bailee of the vendor, the bill of sale gives an immediate and valid title to the purchaser, without a formal delivery of the possession. The possession of the bailee becomes that of the purchaser. *Heines v. Anderson*, 318
3. Such a bill of sale is not merely a transfer of a right of action, but of the goods themselves, and gives an immediate right to the purchaser as owner to demand their restoration. *id.*
4. Where the bailee claims a lien, the claim must be positively made, and its nature, if not its amount, be stated. *id.*
5. When the claim is not so made, his refusal to deliver the goods is sufficient proof of a conversion. *id.*

See ACTION, 3, 4.
AGENT, 2, 3, 4.

SALE OF LANDS.

1. Equity will rescind a contract for the sale of land, upon the application of the purchaser, when it clearly appears that the parties acted under a mutual mistake as to the number of acres or lots which the boundaries contained; and it is proved that the deficiency was material. *Belknap v. Sealey*, 570
2. In such a case, the relief will be granted, even when the words "more or less" are added to the description of the quantity of the land in the contract. *id.*
3. Even when the complaint claims relief solely upon the ground of a fraudulent representation by the vendor,

the relief will be granted, if, in the answer of the defendant, the mistake is confessed. *id.*

SET OFF.

1. Where two persons are indebted to each other, on disconnected demands, and one becomes insolvent, the solvent party cannot maintain an action for that cause alone, to compel an equitable set-off before the debt owing by the insolvent party becomes due. If, before it becomes due, he assigns the demand against the solvent party, the assignee may recover the assigned demand, free from all claims of set-off on the part of the solvent debtor against the insolvent, where there is no pretence that the assignment of the claim was made with intent to defeat the set-off. *Keep v. Lord*, 78
2. When no other ground exists to support an equitable set-off than the insolvency of one of two parties, severally indebted to each other, the right of set-off does not attach until the debt owing by the insolvent has become due. *id.*
3. In an action by the voluntary assignees of an insolvent, to recover the price of goods sold by the debtor to the defendant, the latter cannot set-off a promissory note from the insolvent to himself, which was not due at the time of the assignment, although it became so before the suit was commenced. *Hicks v. McGrorty*, 295
4. In an action for the recovery of rent, reserved in a lease in writing, damage resulting from a subsequent tortious act of the lessor, not amounting to an eviction, nor constituting a breach of any covenant in the lease, could not, before the amendment of the Code, in April, 1852, be recouped or set-off by the defendant. *Mayor of New York v. Mabie*, 401
5. The defendant in an action, will be allowed to set off a judgment in his favor for costs, against a judgment upon a verdict, in favor of the plaintiff, when the latter are shown to be insolvent, notwithstanding they had

previously assigned the verdict to their attorney. *Crocker v. Cloughly*, 684

SHERIFF.

1. A sheriff holding several executions against the same debtor, received at different times, cannot be required to treat those first received as dormant, merely because the plaintiffs therein gave to the sheriff a written consent that he might adjourn a sale under them, for forty-seven days after their return day, there being no agreement giving to the debtor a delay, or the use or benefit of the property in the meantime. *Paton v. Westervelt*, 862
2. The sheriff is not bound to try the question of fraud, nor to decide at his peril which of the two creditors should have the preference, so long as he acts indifferently between the parties, and does not lend himself to either. If a sheriff has notice of incontrovertible facts, which would render it fraudulent, he is bound to treat it as fraudulent. *id.*
3. A plaintiff, in a junior execution, cannot sustain an action for falsely returning it, *nulla bona*, by merely proving that a judgment on which an older execution issued was confessed with intent to defraud creditors, that the sheriff was so notified, and was also notified that the proceeds of the property would be claimed on the junior execution. *id.*
4. The sheriff cannot defend an action for falsely returning *nulla bona*, by proof of a prior execution falsely returned, *nulla bona*. He can justify, under a prior execution, only by showing it executed, and the proceeds applied upon it, or by showing it unreturned, and an existing power as well as a subsisting duty to apply the proceeds upon it. *id.*
5. Where a bond is executed to a sheriff by a deputy, and a third person as surety for the deputy, in an action by the sheriff against such surety, to recover the amount which the sheriff has been compelled, by judgment, to pay for defaults of the deputy, covered

by the condition of the bond, the record of the judgment against the sheriff is *prima facie* evidence in the action against such surety of the deputy's default, on its being proved that the deputy had notice of, and an opportunity to defend the suit against the sheriff, although the surety himself had no notice of it. Where the alleged negligence was in not levying an execution when the debtor has property to satisfy it, proof that the execution was committed to the deputy, a recovery against the sheriff, and notice to the deputy of a suit against the sheriff, and payment by the sheriff of the judgment so recovered, *prima facie* entitle him to recover against the deputy's surety. *Westervelt v. Smith*, 449

6. The reasonable expenses of the sheriff in defending the suit against himself are also recoverable. *id.*
7. A bond conditioned to indemnify the sheriff against all damages, costs, and charges to be imposed upon or demandable of the sheriff, in consequence of the deputy's default, is an agreement to indemnify against a legal liability. *id.*

See EVIDENCE, 2, 3.
 NEGLIGENCE, 1, 2.
 MORTGAGE, 1, 2, 3.

STATUTE OF LIMITATIONS.

See ASSESSMENT, 3.

T

TAXES.

1. Under the Revised Statute relative to the assessment and collection of taxes, every building erected for the use of a seminary of learning, whether the seminary be incorporated or not, and whether public or private, is exempt from taxation. *Chegaray v. Mayor of New York*, 521

2. The building in question was originally planned as three distinct houses; but soon after the foundations were laid, it was agreed between the owner and the plaintiff, that it should be altered and finished so as to adapt it exclusively as one building, to the use of a boarding-school for young ladies; and it was altered and finished accordingly. *id.*

3. *Held*, that by a reasonable construction of the statute, it was to be considered strictly as a building erected for the use of a seminary of learning. *id.*

4. *Held*, that it did not lose its character as such by the fact that the scholars were boarded and lodged, and part of the building used for the dwelling of teachers. *id.*

5. *Held*, that the defendants having admitted, by their answer, that they had received taxes unlawfully collected from the plaintiff, were precluded setting up as a defence, that the plaintiff ought to have sought her remedy by a *certiorari* or *mandamus*, or in an action against other persons. *id.*

See RESIDENCE, 1, 2.

TITLE

See PLEADING, 25.
COERS, 1.

TRESPASS.

1. The plaintiff was the owner of a quantity of pig-iron, lying on Pier 37, North River, which the defendants—one as the superintendent of public streets, the other as a dockmaster—gave notice, unless removed on or before the 3d of September then instant, would be taken to the public yard, and there disposed of, as the ordinances of the corporation direct. On the morning, and early in the afternoon of the 3d September, the defendants caused the iron to be taken to the public yard, and the plaintiff was compelled to pay a considerable sum for charges and expenses, as the condition of its restoration. Had not

the iron been taken to the public yard, it would have been removed on the same day by a person to whom the plaintiff had sold it.

Held, that the notice, by its fair construction, gave to the plaintiff, as owner of the iron, the whole of the 3d of September, to make the removal that was ordered; and that the defendants, by taking it to the public yard, at the time and in the manner they did, rendered themselves liable to him as trespassers. *Coddington v. White*, 390

2. *Held*, also, that the defendants, as public officers, were bound to act in conformity to the city ordinances, and to the terms of the notice; and could not defend themselves upon the ground, that, as private citizens, they had a right to remove the iron, as a nuisance. *id.*

U

USAGE.

See CHECKS, 8.
COMMON CARRIERS, 6.

V

VENDOR AND PURCHASER.

See SALES.

W

WILL.

See DEVISE.

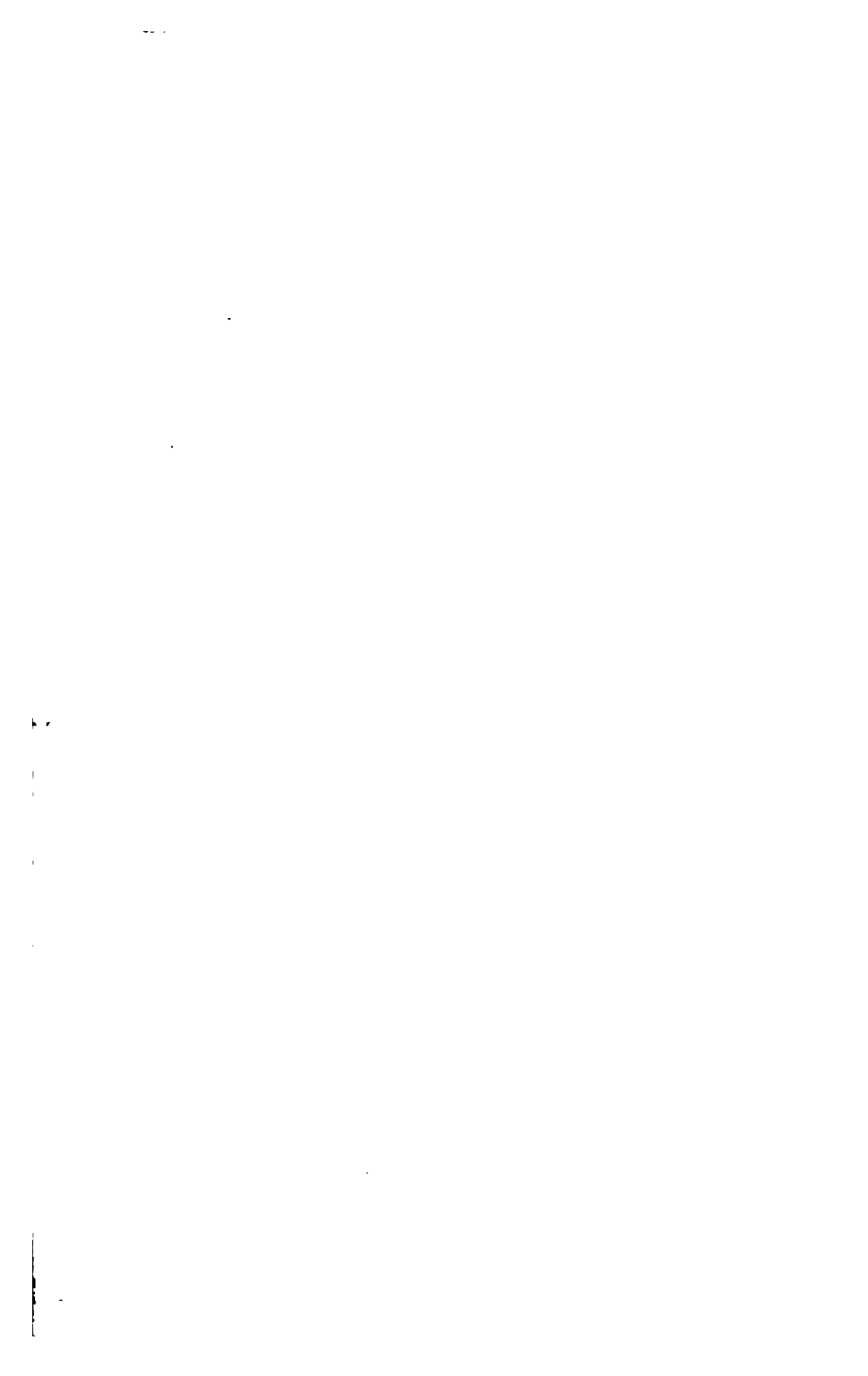
WITNESS.

1. On the trial of this action, in which the defendant was sought to be charged, as the endorser of a promissory note, J. M. was offered as a witness on his behalf, and was rejected,

- on the ground that he had guaranteed the payment of the note, if the endorsement should be proved to be genuine, and had deposited the sum due on the note in the hands of a third person, under an agreement that it should be paid over to the plaintiffs, in the event of their obtaining a verdict. *Van Wyck v. Kobbe*, 86
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4. A person who transfers a promissory note by delivery, without endorsement, is not an assignor within the meaning of the Code, so that when he has been examined as a witness for the plaintiff, the defendant may offer himself as a witness to the same matter in his own behalf. (Code, § 399.) *Watson v. Bailey*, 509
5. Whether an endorser is an assignor within the meaning of the Code, *du bitatur*. *id.*

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5. A defendant against whom a judgment is prayed by the complaint, although no summons has been served on him, has a right to appear and answer under § 139 of the Code. *Higgins v. Rockwell*, 650

Bill of Exceptions.

6. To prevent a failure of justice, the court will order a bill of exceptions, when a case containing the exceptions has been properly settled, to be signed by the clerk, in the name of a deceased judge, who had tried the cause. *Milnehal v. Milward*, 607

Complaint.

7. When a complaint is not properly verified, the verification is a nullity; but the error does not affect the regularity of a subsequent judgment. *Quinn v. Tilton*, 648
8. A general allegation in a complaint, that the defendant had received money, or property, to the use of the plaintiff, or of the assignor of the plaintiff, is bad upon demurrer. *Liesan v. Lincoln*, 670
9. Whether the money or property was so received as to render the defendant liable, is a question of law, and all the material facts necessary to present, and enable the court to determine the question, as facts constituting the cause of action, must be stated in the complaint. *id.*

See PLEADING, 5, 8, 14, 15, 20, 21, 25, 27, 28.

Counter Claim.

10. A counter claim, as defined by the Code, includes only causes of action existing against the plaintiff on the record, and on which, under the old system, an action at law, or a suit in equity, might have been maintained against him. *Gleason v. Moen*, 639

11. Hence, in an action against the maker of a negotiable note by an

endorsee, facts that, admitted to be true, amount only to a valid counter claim against the payee and endorser, cannot be set up, for any purpose, in the answer of the defendant. *id.*

12. But, if the facts, although pleaded as a counter claim, constitute a good defence by way of a set-off, or recoupment, and the note was transferred under circumstances that rendered it subject to all existing equities between the maker and payee, they may be set up as a bar, in whole or in part, to the plaintiff's recovery. *id.*

Costs.

13. The question of title to lands is, in all cases, a question of ownership. The question does not arise in an action to recover damages for the breach of an agreement to convey lands, when the only issue made by the pleadings is, whether an inchoate right of dower in the wife of the defendant was a subsisting encumbrance. *Smith v. Riggs*, 622
14. In such an action, if the plaintiff recovers only nominal damages, the defendant is entitled to full costs. *id.*
15. In an action to set aside a conveyance of real estate, an extra allowance can only be made when the case upon the trial appears to be "difficult or extraordinary," or "the prosecution or defence has been unreasonable or unfairly conducted." *Bridges v. Miller*, 683

Demurrer.

16. The objection, that there is an improper joinder of parties, when the facts appear on the face of the complaint, can only be taken by a demurrer. Code, §§ 144, 147, 148. *Beggett v. Boulger*, 160

See PLEADING, 4, 5, 10, 14, 15, 27 28.

Execution.

17. Where an execution issued against two joint debtors has been levied upon

- the property of one of them, the plaintiff will not be allowed to countermand it, and issue a new execution for the purpose of making a levy upon the sole property of the other defendant. *McChasin v. McKeon*, 645
18. Such a proceeding is emphatically unjust and illegal, when it appears that the first execution was withdrawn at the request of the debtor upon whose property it was levied, and with the express purpose of screening him from the payment of any part of the debt, and collecting the whole from the property of his co-defendant. *id.*
19. When the first execution so levied is not withdrawn, and another issued with the consent of all the defendants, the court will order the second to be set aside, and the first to be returned satisfied. *id.*
20. The rule that a levy, under an execution, upon sufficient property to satisfy the judgment, does not operate *per se* as a satisfaction, is only applicable when the collection of the debt, by force of the levy, is not defeated by the act or fault of the plaintiff. *id.*
21. An assignee of the judgment stands in the same position as the plaintiff upon the record, and the legal consequences of his acts are the same as of those of the plaintiff. *id.*
22. An execution upon a judgment cannot be issued upon the application of the executors of a deceased plaintiff. *Jay v. Martine*, 654
23. Sections 283, 284 of the Code, are only applicable when the parties to the judgment are living. *id.*
- Guardian ad Litem.*
24. When, upon the petition of infants over the age of 14, a guardian *ad litem* has been appointed in a partition suit, the order is valid, although no summons had been previously served upon the infants. *Varian v. Stevens*, 635
25. The jurisdiction of the court is, therefore, complete, when an answer on behalf of the infants has been put in by the guardian so appointed. *id.*
26. The appointment of a guardian *ad litem*, in a partition suit, is regulated by the R. S., and is made by the court (2 R. S., § 2, p. 317). *id.*
27. To such an appointment, the cases of *The People v. Hoffman* (7 Wend. 487) and *Grant v. Van Schoonhoven* (9 Paige, 225) have no application. *id.*
28. The personal service of a summons upon an infant of the age of 14, under § 184. sub. 4 of the Code, has no other use than to hasten the period, within which the plaintiff may apply for the appointment of a guardian, when the infant himself neglects to apply, since, until this appointment is made, there can be no further proceeding against the infant. *id.*
29. When it is not denied that the signatures of infants to their petitions for the appointment of a guardian *ad litem* are genuine, it is no objection to the validity of the judgment in the action in which they were defendants, that it does not appear upon the record, that proof was furnished to the court that the signatures were genuine. It will be presumed that proof was given. *id.*
30. A variance in the name of an infant as stated in the complaint, and in the petition for the appointment of a guardian, may be disregarded as immaterial, both under the Code and under the R. Statute of Amendments (Code, § 176; R. S., § 7, sub. 10, p. 425). *id.*
- Injunction.*
- See AGREEMENT, 1, 2, 3, 4.
- Judgment.*
- See JUDGMENT, *Ante*.
- Jurisdiction.*
- See JURISDICTION, *Ante*.

Motion.

31. A motion for the appointment of a receiver, when the order to show cause against the appointment is served before the commencement of the suit, will be denied as irregular. *Kattensroth v. Astor Bank*, 632

32. An order for the payment of money under subdivision 5, § 244 of the Code, will not be made, unless the answer contains a plain, explicit, and full admission that a definite sum is due to the plaintiff. It will not be made when, in order to ascertain whether a specific sum is due, a critical examination of the pleadings, or of books and accounts, is necessary. *Courson v. Hamlin*, 531

33. The provision in the Code is regarded by the court as a recognition and declaration of the rule which formerly prevailed in the Court of Chancery, and as going no further. *id.*

34. The rule in that court was settled, that an order for the payment of money into court, or to a party before a final decree, could not be made unless upon an explicit and full admission by the defendant in his answer, or upon his examination before a master, that a specific sum was due. *id.*

Parties.

35. The rule, that persons only severally liable cannot be included in the same action as parties defendants, has not, as a general rule, been altered by the Code. *Le Roy v. Shaw*, 626

36. The only exceptions are those created by § 120 of the Code.

No exception is created by § 187 of the Code, since the causes of action, which may be united under that section, must "affect all the parties to the action." *id.*

37. *Semble*, that when the action is brought upon a collateral undertaking for the debt of another, the complaint must aver that the promise was in writing. *id.*

38. In an action to recover damages for slanderous words spoken of a married woman, if the words are actionable *per se*, the husband is a necessary party as plaintiff. *Klein v. Hents*, 633

39. Where the words are actionable only by reason of special damage, the husband must sue alone. *id.*

40. When the act of a municipal corporation, against which relief is sought, affects injuriously the whole community over which the corporate jurisdiction extends, the attorney-general is a necessary party to the prosecution of the suit. *Davis & Palmer v. The Mayor of New York*, 663

41. It is only when the corporate act which is a public wrong works also a special injury to particular individuals, that the action can be maintained in their names alone. *id.*

42. Where the presence of other parties than those mentioned in the complaint is necessary to the complete determination of a controversy, the language of the Code, § 122, is imperative; they must be brought in. *id.*

43. A judgment in an action, in which the attorney-general is a prosecuting party, binds the public which he represents, and is a bar to an action by individuals for the same cause; consequently, his presence is necessary to "the complete determination of the controversy," when the corporate act which is sought to be restrained or annulled is a public injury. *id.*

See ACTION, 14, 15, 16, 17.
PLEADING, 24.

Petition.

44. A petition for the discharge of a debtor, imprisoned under an execution, cannot be heard by a judge at chambers. It must be presented to the court at a regular special term. *In the matter of Walker*, 655

45. It cannot be heard, in the first instance, at a general term: the court at general term exercising only as

appellate jurisdiction, with the exception of the cases specified in § 265 of the Code. *id.*

Proceedings Supplementary to Execution.

46. A foreign consul cannot be examined as a judgment debtor, under the provisions of the Code; and if an order for his examination has been obtained, and served, he cannot be attached for his refusal to obey it. *Griffin v. Dominguez*, 656

47. The objection to the jurisdiction of a state court is fatal, in whatever stage of the proceedings it is raised. *id.*

Receiver.

48. When judgment creditors have acquired a lien upon a fund in the hands of a receiver, the court will not, upon their petition, make an order upon the receiver to satisfy the judgment out of the moneys in his hands, until a decree has been made in the action in which the receiver was appointed, and notice has been given to all other creditors interested in the distribution of the fund. But in order to protect the petitioners, an order will be made upon the receiver, forbidding him to make any payments out of the fund without notice to the petitioners, or their attorney, and allowing the petitioners to institute such an action against the receiver and other parties, as they may be advised. *Hubbard v. Guild*, 685

Security for Costs.

49. Where, under an order upon the plaintiff to file security for costs, an undertaking executed by two sureties is filed, the justification of one of the sureties, upon exceptions, is sufficient. *Riggins v. Williams*, 678

Substitution.

50. When a plaintiff transfers his interest after the commencement of the suit, it rests entirely in the discretion of the court, whether the assignee

shall be substituted as plaintiff, under § 121 of the Code. *Murray v. General Mut. Ins. Co.*, 607

51. No such order of substitution will be made, unless special circumstances are shown to satisfy the court of its propriety or necessity; and, in all cases, it will be made a condition, that the original plaintiff, the assignor, shall not be examined as a witness on behalf of the assignee. *id.*

Trial.

52. It rests wholly in the discretion of the judge who tries a cause whether he will permit the pleadings to be read to the jury. *Willis v. Forrest*, 810

53. When the issues raised upon the pleadings are irrelevant or immaterial, the judge is not bound to submit them to the determination of the jury, and may therefore withhold from the jury the pleadings in which they are contained. *id.*

R

RESIDENCE

1. The plaintiff, in the year 1850, and for several years before, resided in a hired house in the City of New York, during the winter and spring, and at his country seat in the town of Flushing, Queens County, during the summer and autumn. In the winter of 1850, he was assessed in New York for a tax on his personal estate, and in the summer was assessed for a similar tax in Flushing, which he paid. He resisted the payment of the tax in New York, and filed his complaint to restrain its collection. *Douglas v. Mayor*, 110

2. *Held*, that whether the domicile of the plaintiff was or was not at Flushing, he was a resident of New York, and liable to be taxed as such when the tax for the city was assessed. *id.*

S

SALES.

1. When neither a warranty nor a fraud in a sale is alleged, it is no defence that the goods were unsound and unmerchantable at the time of the sale. *Gihon v. Levy*, 176
2. Where the goods are in the possession of a bailee of the vendor, the bill of sale gives an immediate and valid title to the purchaser, without a formal delivery of the possession. The possession of the bailee becomes that of the purchaser. *Heines v. Anderson*, 318
3. Such a bill of sale is not merely a transfer of a right of action, but of the goods themselves, and gives an immediate right to the purchaser as owner to demand their restoration. *id.*
4. Where the bailee claims a lien, the claim must be positively made, and its nature, if not its amount, be stated. *id.*
5. When the claim is not so made, his refusal to deliver the goods is sufficient proof of a conversion. *id.*

See ACTION, 3, 4.
AGENT, 2, 3, 4.

SALE OF LANDS.

1. Equity will rescind a contract for the sale of land, upon the application of the purchaser, when it clearly appears that the parties acted under a mutual mistake as to the number of acres or lots which the boundaries contained; and it is proved that the deficiency was material. *Belknap v. Sealey*, 570
2. In such a case, the relief will be granted, even when the words "more or less" are added to the description of the quantity of the land in the contract. *id.*
3. Even when the complaint claims relief solely upon the ground of a fraudulent representation by the vendor,

the relief will be granted, if, in the answer of the defendant, the mistake is confessed. *id.*

SET OFF.

1. Where two persons are indebted to each other, on disconnected demands, and one becomes insolvent, the solvent party cannot maintain an action for that cause alone, to compel an equitable set-off before the debt owing by the insolvent party becomes due. If, before it becomes due, he assigns the demand against the solvent party, the assignee may recover the assigned demand, free from all claims of set-off on the part of the solvent debtor against the insolvent, where there is no pretence that the assignment of the claim was made with intent to defeat the set-off. *Keep v. Lord*, 78
2. When no other ground exists to support an equitable set-off than the insolvency of one of two parties, severally indebted to each other, the right of set-off does not attach until the debt owing by the insolvent has become due. *id.*
3. In an action by the voluntary assignees of an insolvent, to recover the price of goods sold by the debtor to the defendant, the latter cannot set-off a promissory note from the insolvent to himself, which was not due at the time of the assignment, although it became so before the suit was commenced. *Hicks v. McGorty*, 295
4. In an action for the recovery of rent, reserved in a lease in writing, damage resulting from a subsequent tortious act of the lessor, not amounting to an eviction, nor constituting a breach of any covenant in the lease, could not, before the amendment of the Code, in April, 1852, be recouped or set-off by the defendant. *Mayor of New York v. Mabie*, 401
5. The defendant in an action, will be allowed to set off a judgment in his favor for costs, against a judgment upon a verdict, in favor of the plaintiff, when the latter are shown to be insolvent, notwithstanding they had

previously assigned the verdict to their attorney. *Crocker v. Cloughly*, 684

SHERIFF.

1. A sheriff holding several executions against the same debtor, received at different times, cannot be required to treat those first received as dormant, merely because the plaintiffs therein gave to the sheriff a written consent that he might adjourn a sale under them, for forty-seven days after their return day, there being no agreement giving to the debtor a delay, or the use or benefit of the property in the meantime. *Paton v. Westervelt*, 862
2. The sheriff is not bound to try the question of fraud, nor to decide at his peril which of the two creditors should have the preference, so long as he acts indifferently between the parties, and does not lend himself to either. If a sheriff has notice of incontrovertible facts, which would render it fraudulent, he is bound to treat it as fraudulent. *id.*
3. A plaintiff, in a junior execution, cannot sustain an action for falsely returning it, *nulla bona*, by merely proving that a judgment on which an older execution issued was confessed with intent to defraud creditors, that the sheriff was so notified, and was also notified that the proceeds of the property would be claimed on the junior execution. *id.*
4. The sheriff cannot defend an action for falsely returning *nulla bona*, by proof of a prior execution falsely returned, *nulla bona*. He can justify, under a prior execution, only by showing it executed, and the proceeds applied upon it, or by showing it unreturned, and an existing power as well as a subsisting duty to apply the proceeds upon it. *id.*
5. Where a bond is executed to a sheriff by a deputy, and a third person as surety for the deputy, in an action by the sheriff against such surety, to recover the amount which the sheriff has been compelled, by judgment, to pay for defaults of the deputy, covered

by the condition of the bond, the record of the judgment against the sheriff is *prima facie* evidence in the action against such surety of the deputy's default, on its being proved that the deputy had notice of, and an opportunity to defend the suit against the sheriff, although the surety himself had no notice of it. Where the alleged negligence was in not levying an execution when the debtor has property to satisfy it, proof that the execution was committed to the deputy, a recovery against the sheriff, and notice to the deputy of a suit against the sheriff, and payment by the sheriff of the judgment so recovered, *prima facie* entitle him to recover against the deputy's surety. *Westervelt v. Smith*, 449

6. The reasonable expenses of the sheriff in defending the suit against himself are also recoverable. *id.*
7. A bond conditioned to indemnify the sheriff against all damages, costs, and charges to be imposed upon or demandable of the sheriff, in consequence of the deputy's defaults, is an agreement to indemnify against a legal liability. *id.*

See EVIDENCE, 2, 3.

NEGLECT, 1, 2.

MORTGAGE, 1, 2, 3.

STATUTE OF LIMITATIONS.

See ASSESSMENT, 3.

T

TAXES.

1. Under the Revised Statute relative to the assessment and collection of taxes, every building erected for the use of a seminary of learning, whether the seminary be incorporated or not, and whether public or private, is exempt from taxation. *Chegaray v. Mayor of New York*, 521

2. The building in question was originally planned as three distinct houses; but soon after the foundations were laid, it was agreed between the owner and the plaintiff, that it should be altered and finished so as to adapt it exclusively as one building, to the use of a boarding-school for young ladies; and it was altered and finished accordingly. *id.*

3. *Held*, that by a reasonable construction of the statute, it was to be considered strictly as a building erected for the use of a seminary of learning. *id.*

4. *Held*, that it did not lose its character as such by the fact that the scholars were boarded and lodged, and part of the building used for the dwelling of teachers. *id.*

5. *Held*, that the defendants having admitted, by their answer, that they had received taxes unlawfully collected from the plaintiff, were precluded setting up as a defence, that the plaintiff ought to have sought her remedy by a *certiorari* or *mandamus*, or in an action against other persons. *id.*

See RESIDENCE, 1, 2.

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See PLEADING, 25.
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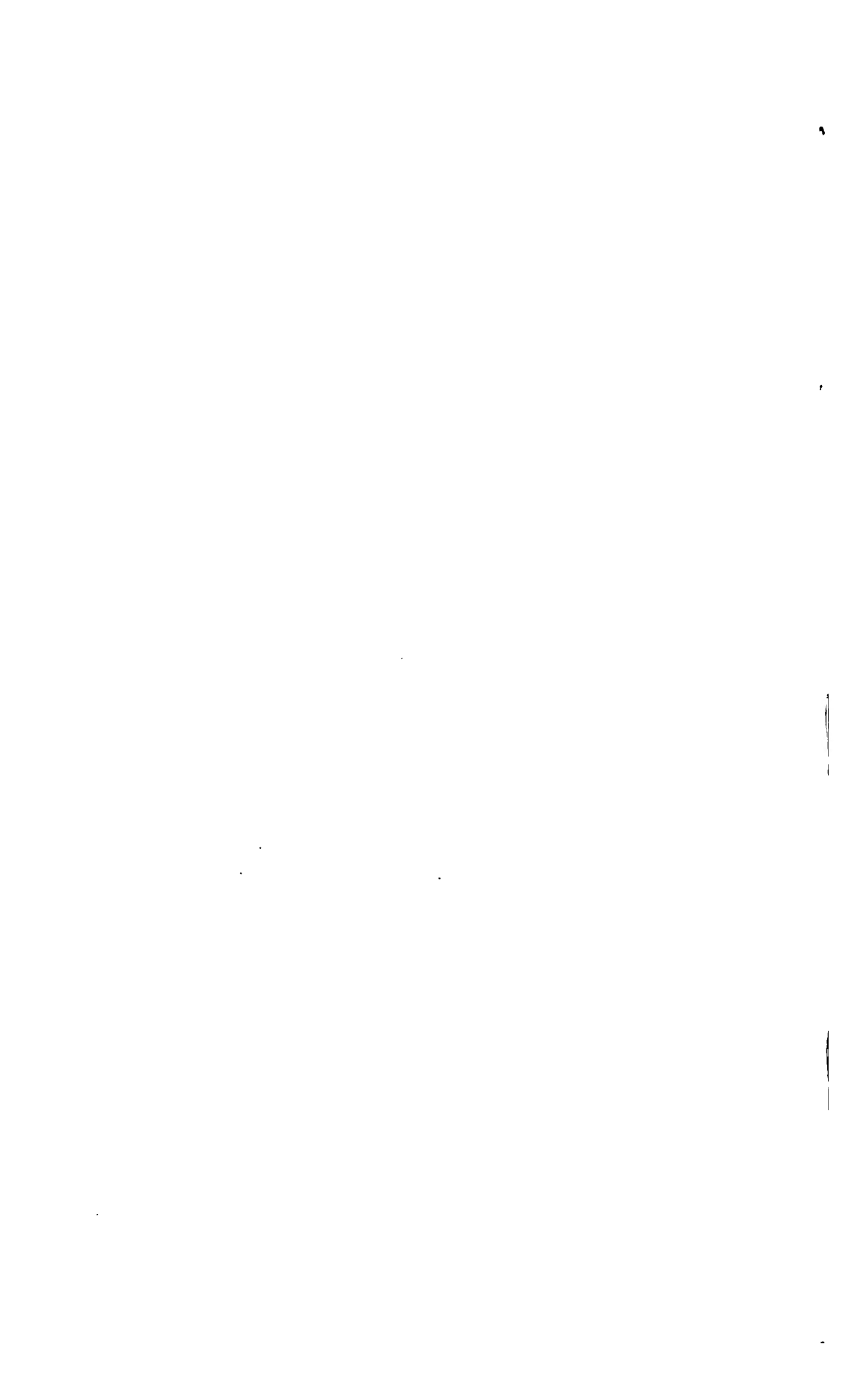
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